



STATE BOARD OF EQUALIZATION
(916) 920-7445

June 2, 1992

Dear

Enclosed is a copy of the Decision and Recommendation pertaining to the above referenced petition for reconsideration of successor liability. I have recommended that the petition be denied.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options.

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Principal Tax Auditor at the same box number. No special form is required, but the request must clearly set forth any new contentions, and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Ms. Janice Masterton, Assistant to the Executive Director, at the above post office box.

If neither a request for Board hearing nor a Request for Reconsideration is received within thirty (30) days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,

H. L. Conen
Senior Staff Counsel

HLC: ct Enclosure

cc: Ms. Janice Masterton
Assistant to the Executive Director (w/enclosure)
Mr. Glenn Bystrom
Principal Tax Auditor (file attached)
San Diego - District Administrator (w/enclosure)

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEAL REVIEW SECTION

In the Matter of the Petition)	
for Redetermination of Successor)	
Liability for State and Local)	
Sales and Use Taxes of:)	DECISION AND RECOMMENDATION
)	No. ----
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel H. L. Cohen on April 15, 1992, in San Diego, California.

Appearing for Petitioner:

Appearing for the Sales and Use Tax Department: Ms. A. Spangler
Senior Tax Auditor
San Diego District

Protested Item

Petitioner protests the assertion of successor liability for the period July 1, 1985 through March 31, 1988 for liabilities of \$16,826.46 plus interest and penalty, measured by:

<u>Item</u>	<u>State, Local and County</u>
C. Final sale of fixtures and equipment	\$112,000

Contentions

Petitioner contends that:

1. All amounts of the purchase price which it was required to withhold were in fact withheld and paid to the Board.
2. The Board's failure to issue a tax clearance within 60 days bars any further collection of amounts from petitioner.
3. The sale was actually an exempt occasional sale.

Summary

Petitioner is a corporation which is engaged in selling printed advertising material and in providing mailing services. On March 31, 1988, it purchased ---, which was engaged in the same business.

On March 14, 1988, petitioner requested a tax clearance from the Board. Escrow closed in April of 1988. By letter dated April 14, 1988, the escrowholder submitted a check for tax purportedly due and also stated that the parties had waived the obtaining of a tax clearance. The former owner's records were made available for audit within two weeks after the closing of the escrow.

A close-out audit of the former owner was conducted. An audit reported dated October 17, 1988 showed an understatement in the amount of tax due from the former owner. On May 8, 1990, a notice of successor liability was issued to petitioner.

Petitioner contends that because the notice was not mailed within 60 days after the request for clearance, petitioner is relieved of all liability. Petitioner contends that this 60-day limit is established in Section 6812 of the Revenue and Taxation Code. Petitioner contends that the waiver was between petitioner and the former owner and did not constitute a withdrawal of petitioner's request to the Board for clearance.

Petitioner also contends that the assets purchased which are the basis for the former owner's deficiency were not used in an activity which required the holding of a seller's permit. Therefore, the transaction was an exempt occasional sale. Petitioner states that nearly all of the assets were used in preparing material for mailing and marketing which are service activities. Petitioner states that a typical transaction consisted of arranging for printing of advertising materials which the former owner mailed. Less than two percent of revenue is from the sale of printed material. Petitioner cites Ontario Community Foundation, Inc. v. State Board of Equalization, 35 Cal.3d 811, as support for the contention that the transaction was an occasional sale and that only those assets utilized in the activities which require the holding of a seller's permit can be taxed.

The auditor states that the former owner's taxable activities consisted of sales of printed material and reply envelopes. The percentage of taxable sales to total sales was 8.2 percent for fiscal year 1986 and 2.3 percent for fiscal year 1987. The former owner had a printing press and printed some material itself.

Analysis and Conclusions

Section 6811 of the Revenue and Taxation Code provides:

"If any person liable for any amount under this part sells out his business or stock of goods or quits the business, his successors or assigns shall withhold sufficient of the purchase price to cover such amount until the former owner produces a receipt from the board showing that it has been paid or a certificate stating that no amount is due."

Petitioner as a successor to the business of --- was required to withhold from the purchase price an amount to cover --- tax debt inasmuch as no tax clearance was ever issued. Section 6812 provides:

"(a) If the purchaser of a business or stock of goods fails to withhold from the purchase price as required, he or she becomes personally liable for the payment of the amount required to be withheld by him or her to the extent of the purchase price, valued in money.

"(b) (1) Within 60 days after the latest of the dates specified in paragraph (2), the board shall either issue the certificate or mail notice, to the purchaser at his or her address as it appears on the records of the board, of the amount that must be paid as a condition of issuing the certificate.

"(2) For purposes of paragraph (1), the latest of the following dates shall apply:

"(A) The date the board receives a written request from the purchaser for a certificate.

"(B) The date of the sale of the business or stock of goods.

"(C) The date the former owner's records are made available for audit.

"(c) Failure of the board to mail the notice referred to in subdivision (b) will release the purchaser from any further obligation to withhold from the purchase price as above provided. The last date upon which the obligation of the successor may be enforced shall be not later than three years after the date the board is notified of the purchase of the business or stock of goods."

There are two time limitations in Section 6812. The three-year limitation period for mailing of a notice of liability was easily met. The notice was mailed approximately 25 months after the sale. Petitioner contends that the Board is barred from pursuing it because the Board did not act within the 60-day period to issue a clearance or to mail a notice of the amount to be paid. This would be true except for the notice from the escrowholder that a clearance was no longer needed. Petitioner's argument that this represented only an agreement between petitioner and the seller and was not a withdrawal of the request for clearance cannot be sustained. The escrowholder acted as petitioner's agent. It clearly stated to the Board that no clearance was required. Absent this notice, the Board may very well have timely issued a notice of an amount to be paid. I conclude that neither time limitation bars the Board from asserting liability against petitioner.

Section 6367 exempts occasional sales from tax. Section 6006.5 defines "occasional sale" to include the sale of property not held in the course of activities which require the holding of a seller's permit. Petitioner contends that under the Ontario case,

only those assets associated with taxable transactions are subject to tax. Petitioner misreads the case. Under Santa Fe Energy Company v. State Board of Equalization, 160 Cal.App.3d 176, the criteria is not whether there are taxable sales but whether there are sales of tangible personal property, taxable or otherwise. The Ontario case deals with an entity which is primarily a provider of services. Sales and Use Tax Regulation 1595 provides in subdivision (a)(5)(B)2 that where a service business and a sales business are operated together so as to constitute one business, tax will apply to the sale of the assets of the business. Sales of advertising material and the service of mailing such material are inseparable activities of a single business. The transaction was not an occasional sale.

Recommendation

Deny the petition.

H. L. Cohen, Senior Staff Counsel

5/14/92
Date