



STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

In the Matter of the Petition For Redetermination of Sales Tax;	DECISION AND RECOMMENDATION OF HEARING OFFICER
Petitioner	Account No.

The above-entitled matter came on regularly for hearing on Tuesday, November 21, 1972 at 1:30 p.m., in San Francisco, California.

Appearances:

For Petitioners:

For Board of Equalization

Protest

Mr. X----- protests the tax liability asserted against him jointly and severally for sales tax determined to be due for the third quarter of 1971.

Mr. X----- did not register any specific protest except to the extent that he objected to the amount of tax. Measure of tax: \$13,667.

Contention

Mr. X----- contends that he was not a partner in business with Mr. X----- during the period in question and had not been [one] since midnight, January 10, 1970. He disclaims all personal liability.

Mr. X----- contends that sales during the third quarter or 1971, were between \$4,000 and \$5,000.

The liability under consideration is measured by \$13,667 representing estimated gross receipts during the third quarter of 1971. The estimate was arrived at using, as a basis, the amounts filed in the earlier quarters as representing gross receipts. Thus, the tax, interest (to 04-23-72), and penalty (for failure to file a 3 Q 71 return) as determined on March 24, 1972, was:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$683.35	\$21.50	\$68.35	\$773.19

A determination was issued on March 24, 1972 in the following name:

X-----

Account number Z----- was shown on the determination. In addition, copies of the determination were sent to X-----, X----- CA AND TO X----- CA.

The following exhibits were entered to support the contention that the partnership had been dissolved and Mr. X----- had no personal liability for the tax as determined:

- I. Letter dated January 10 from X-----, Attorney at Law to X-----, Messr. X----- and X----- to send all creditors a copy of notice of dissolution of partnership.
- II. Letter to Creditors. The notice advising creditors that the partnership was dissolved.
- III. Copy of a legal notice published in the San Mateo Times on January 16, 23, 30, and February 6, 197[0]. This is a notice and publication of a "Certificate of Individual Transacting Business Under a Fictitious Name"

When the determination was issued Mr. X----- wrote a letter protesting the assertion of any liability for taxes against Mr. X----- on the ground that Mr. X----- was not a partner during the time the alleged liability arose. We contended that the [Board of Equalization] was notified of the partnership dissolution with the return filed for the fourth quarter of 1969 and he produced copies of the above-referenced exhibits to support the contention.

Mr. X----- acknowledged the fact that the partnership had been dissolved as indicated and on the date shown. He also voiced the opinion that he was personally liable for any taxes due for the third quarter of 1971.

Mr. X----- contended that the measure was too high since he estimated the gross sales in that period to be somewhere between \$4,000 and \$5,000. He stated that all he had to support such a statement was bank deposits.

Further, Mr. X----- stated he did not sell the business to anyone. Instead, he merely closed the doors and abandoned it. The landlord, apparently, acquired what inventory had been abandoned. When asked about 1971 income tax returns, Mr. indicated he did not file any because he owed no taxes.

Conclusions

Two issues are raised by this petition: (1) What is the measure of the tax; and (2) IS Mr. X----- legally liable for it?

(1) A Notice of Determination (certificate of delinquency) carries with it the presumption that it is correct and the taxpayer has the burden of proving it wrong and producing figures from his records to support another and correct determination. *People v. Schwartz* (1974) 31 Cal. 2d 59.

Nothing was produced by Mr. X----- to support a conclusion that the estimated liability was wrong or excessive. The average gross receipts reported since 1968 was about \$11,600.

(2) There is no doubt about the fact that the partnership was dissolved. However, there is no record of dissolution on file with the State Board of Equalization.

The legal notice, Exhibit III merely indicates that X-----, an individual, will do business under the fictitious name of X-----, and that he is the owner of the business. No one reading it would even suspect that there was a partnership that had been doing business under that same name and that it had been dissolved and that Mr. X-----was one of the partners. The legal notice is not sufficient notice to the Board of Equalization that the partnership had been dissolved.

Mr. X----- signed Sales and Use Tax Returns as "owner" after he was no longer a partner. However, he signed returns as "owner" when he was a partner too. This certainly cannot be deemed sufficient to put the Board of Equalization on notice that there was no longer a partnership. Further, as a partner he was an owner of an undivided portion of the business.

The State of California was a creditor as far as liability for sales tax was concerned. The permit was issued to Mr. X----- and Mr. X----- jointly and severally as "retailers" for the privilege of making retail sales and for that privilege they were required to pay to the state a tax measured by a certain percent of their receipts.

Section 15035.5 of the California Corporations Code (Uniform Partnership Act) provides:

"Whenever a partnership is dissolved, a notice of the dissolution shall be published at least once in a newspaper of general circulation in the place, or in each place if more than one, at which that partnership business was regularly carried on, and an affidavit showing the publication of such notice shall be filed with the county clerk within thirty days after such publication."

Actual notice of dissolution of partnership is necessary as to firms having prior credit dealings with the partnership in order to enable a retiring partner to escape liability for obligations incurred after dissolution of the partnership.

While publication of notice of dissolution of partnership may be evidence from which actual knowledge on the part of a creditor can be inferred, publication alone does not compel a finding of actual knowledge, and a retiring partner is not justified in placing sole reliance upon publication of notice of dissolution to avoid liability for debts incurred after dissolution of a partnership. *Credit Bureaus of Merced Count., Inc. v. Shipman* (1959) 167 Cal.App.2d 673.

The foregoing case law indicates that a retiring partner might be liable for obligations that incurred after dissolution is only evidence from which actual knowledge on the part of a creditor can be inferred, but it does not compel a finding that there was actual knowledge.

It cannot be concluded that the Board of Equalization received actual notice of the dissolution from the publications entered as Exhibit III. Further, if the Board had been notified, a new permit would have been issued to Mr. X----- as an individual and the partnership permit would have been closed out effective January 10, 1970. There would most likely have been an audit of the books pursuant to close-out.

Using the title "owner" instead of "partner" cannot be held to amount to actual notice to the Board that the partnership no longer existed.

In an action against a former member of a partnership for good allegedly sold and delivered to the partnership, wherein defendant contended that they had been sold to a corporation formed upon dissolution of the partnership and bearing the former partnership's name with the addition of "INC.", in view of evidence that seller had considerable course for dealing with the partnership, that during the time credits were extended, business was carried on under license issued to the partnership, that there was no proof of formal notice of change and conflict as to whether the seller had knowledge of incorporation, there was sufficient evidence to support the finding that the debt was incurred on account of the partnership. *Oregon Cedar Products v. Kohler* (1957) 148 Cal.App2d 67-.

In as much the partnership was, in fact, dissolved the permit issued in the name of the partnership showing both Mr. X----- and Mr. X----- as partners, was inactive, and it should not have been used to carry on and report operations of an individual proprietorship.

Regulation 1699 (Title 18 Cal. Admin. Code Sec. 1699) provides in part:

"Upon discontinuing or transferring a business, a permit shall promptly notify the Board and deliver his permit to the Board for cancellation. To be acceptable, the notice of transfer of 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 of 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 of business successor's application for a seller's permit may serve to put the Board on notice of the transferor's cessation of business.

"Unless the permit holder who transfers the business notifies the Board of the transfer, or delivers the permit to the Board for cancellation, he well be liable for taxes, interest, and penalties 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 the 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."

In summary, the first time any representative of the Board had notice that there was no longer a partnership was when Mr. X----- wrote and alleged same, and this was in March 1972. Therefore, as for the remaining sales tax liability Mr. X----- is jointly and severally liable for the tax debt owed to the state for the period from 7-1-71 through 9-30-71.

Recommendation

Redetermine without adjustments.

Robert H. Anderson, Hearing Officer

Date