

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

410.0198

APPEALS UNIT

In the Matter of the Late	)	HEARING
Protest Under the Sales and	)	DECISION AND RECOMMENDATION
Use Tax Law of:	)	
	)	
H--- & L--- K---	)	No. S- -- XX XXXXXX-010
dba R--- C--- S---	)	-020
	)	
<u>Protestant</u>	)	

The appeal hearing in this matter was scheduled for March 8, 1989, in San Francisco, California, before James E. Mahler, Hearing Officer. Notice of the hearing was mailed to Ms. L--- K---'s last known address on February 7, 1989. The notice was returned by the post office with a notation that forwarding time had expired. We have requested the staff to try to find a current address for Ms. K---, but as yet they have not been successful.

Appearing for Protestant:	None
Appearing for the Department of Business Taxes:	Emil G. Pollak Compliance Specialist

Protested Item

The protested tax liability for the combined period January 1, 1982, through January 15, 1983, is measured by:

<u>Item</u>	<u>State, Local County &amp; Bart</u>
Taxable sales not reported:	
1/1/82 – 9/30/82	\$30,519
10/1/82 – 1/15/83	<u>48,557</u>
	\$79,076

Contention

Ms. K--- contends that she has no personal liability for the taxes in question.

### Summary

According to the Board's records, R--- C--- S--- (herein referred to as "petitioner") was a husband/wife co-ownership of H--- and L--- K---. The business was a coffee service with sales of cups and spoons. Determinations for sales or use tax liabilities were issued against petitioner for the combined period January 1, 1982, through January 15, 1983. The determinations became final without being paid, so collection activity was initiated.

In partial satisfaction of the liabilities, the Board attached two state income tax refunds due to L--- K---, one in the amount of \$447, which was received by the Board on May 21, 1985, and the other in the amount of \$20.21, which was received on July 11, 1985. Upon learning that these refunds had been attached, Ms. K---'s attorney wrote to the Board on August 14, 1985, contending that Ms. K--- had no personal liability for the business debts. The staff responded to this letter on August 28, 1985, stating that liability was predicated on the predecessor provisions of Sales and Use Tax Regulation 1699(e), and advising that Ms. K---'s "only administrative remedy" was to pay the liability in full and file a claim for refund.

Ms. K--- then presented additional documentation to the San Francisco district staff, and ultimately, on February 1, 1987, she filed a claim of the amounts attached by the Board. The staff responded that the claim for refund was barred by the statute of limitations. However, the staff also construed the claim as a late protest of any amounts remaining due on the original determination against petitioner.

The documentation which Ms. K--- presented to the district staff established the following facts. Ms. K--- and her husband were separated on September 22, 1980, and filed for divorce on December 11, 1980. On March 10, 1981, as part of the divorce proceedings, the court ordered the petitioner business transferred to Mr. K--- personally. The actual transfer of the business was apparently accomplished on November 6, 1981. (See petition file, page S-1.) The final decree of divorce was also issued on March 30, 1982.

The Board's files also reveal that petitioner's seller's permit was revoked on September 24, 1981, for failure to pay a delinquent liability. Mr. K--- visited the district office and paid the delinquency plus a \$15 reinstatement fee on November 17, 1981, and the permit was thereupon reinstated. Mr. K--- signed the reinstatement application as "co-owner", so the Board's records continued to show petitioner as a husband/wife co-ownership.

### Analysis and Conclusions

Subdivision (e) of Sales and Use Tax Regulation 1699 provides that upon discontinuing or transferring a business, the permit holder shall promptly notify the Board and deliver the permit to the Board for cancellation. The last paragraph of that subdivision then goes on to provide:

“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 or 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 he 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.” (Emphasis added.)

We need not decide whether the Board had actual knowledge that Ms. K--- had withdrawn from the petitioner business. Predecessor liability is imposed only when the successor uses the predecessor permit with the predecessor’s “actual or constructive knowledge.” We have concluded that Ms. K--- did not have such knowledge.

The Board revoked the processor permit on September 24, 1981. On November 6, 1981, while the permit was inactive, Ms. K--- transferred her interest in the business to Mr. K---. Eleven days later, on November 17, 1981, Mr. K--- visited the Board’s district office to reinstate the permit. There is nothing in the record to indicate that Ms. K--- had actual or constructive knowledge that Mr. K--- reinstated the predecessor permit, rather than obtaining a new permit in his own name. Lacking such knowledge, she cannot be held liable as a predecessor.

The letter from Ms. K---’s attorney dated August 14, 1985, did not use the word “refund” and therefore was not considered a claim for refund by the Board’s staff. Nevertheless, the letter did clearly state that Ms. K--- could not be held liable for any debts of the petitioner business. We construe this letter as a claim for refund and, since it was received by the Board within six months of the time the income tax refunds were attached, the claim is not barred by the statute of limitations. The claim for refund should be granted.

#### Recommendation

Grant the claim for refund in the amount of \$467.21, plus interest. Remove Ms. K---’s name from petitioner’s permit and cease collection action against her for the amounts in question.

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James E. Mahler, Hearing Officer

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April 13, 1989

Date