

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petitions)	
for Reconsideration of Successor)	
Liability for State and Local)	
Sales and Use Taxes of:)	DECISION AND RECOMMENDATION
)	
H--- P--- C---, INC.)	No. SN -- XX-XXXXXXX-010
<u>Petitioner</u>)	
M--- D--- C---, INC.)	SY -- XX-XXXXXXX-010
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel W. E. Burkett on March 25, 1994 in San Bernardino, California.

Appearing for Petitioners: Mr. J--- M--- S---
Attorney at Law

Appearing for the Sales and Use Tax Department: Mr. Gerald L. Davenport
District Principal
Compliance Supervisor

Mr. David E. Horwitz
Business Taxes
Compliance Supervisor

Ms. Roberta Cornell
Senior Tax Representative

Protested Item

Petitioners protest the assertion of successor liability for the period April 1, 1990 through December 31, 1990 for tax liabilities of \$82,970.32, a finality penalty of \$15,171.90, plus additional interest as provided by law.

Liability due as successor to account number SR EHC XX-XXXXXX. (Includes interest computed to August 25, 1992).	\$120,536.67
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Contentions of Petitioners

M--- D--- C---, Inc. (MDC)

- A. MDC did not purchase the predecessor's stock of goods.
- B. Cancellation of the initial billing against MDC was a final determination that it was not liable as successor.
- C. MDC did not purchase the business for which it is being held liable as a successor.

H--- C---

- A. H--- purchased the goods from the inventory lienholder, S--- P--- B---
- B. The interstate commerce and due process clauses of the Federal constitution prohibit the imposition of successorship liability against H---
- C. The Board could not assert a lien on the inventory assets of the predecessor.
- D. H--- did not purchase a stock of goods.
- E. Credit is due for payments made by the predecessor.

Summary

This decision reviews separate billings for successorship liability issued against M--- D--- Inc. (MDC) and H--- P--- C---, Inc. (H---). The billings were an outgrowth of a letter agreement entered into between W--- E--- B--- M---, Inc. (WEBM) and MDC for the sale of the business assets of the --- --- location of WEBM to MDC.

The above-referenced letter agreement which was dated December 7, 1990, provided for sale of inventory priced at \$149,425.30 and furniture and fixtures priced at \$2,400 for a total consideration of \$151,825.30 for each. This agreement formed the basis for an initial successorship billing against MDC on March 6, 1991.

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This initial billing was canceled on March 19, 1992, when the Department's representative was advised that the actual purchase had been made by a sister corporation, H---, which did business in Arizona. The successorship billing against the petitioners was reinstated on July 22, 1992, when H--- claimed that it did not purchase the goods from WEBM. A successorship billing was also issued against H---.

MDC contends that a large portion of the inventory was removed to Arizona when the parties failed in their efforts to negotiate a new lease term for MDC. It is claimed that the remainder of the inventory was sold to H--- by S--- P--- B--- (bank) to satisfy an inventory lien. A copy of H---'s draft to the bank dated December 18, 1990, in the amount of \$151,825.30 is submitted as Exhibit C to petitioners' letter brief dated April 19, 1994.

Petitioner MDC argues that the letter agreement for the sale of the inventory was not completed because MDC was unable to reach an agreement with the landowner for a new lease term. It is thus contended that MDC was not obligated to perform the purchase agreement. MDC did in fact occupy the former business premises of WEBM and paid rent equivalent to the amount due under WEBM's original lease on a month-to-month basis.

It is also contended that MDC did not obtain possession of the inventory. It is claimed that the inventory was subsequently resold to H--- by the lienholder, S--- P--- B---. This allegedly was instituted by a call to a representative of MDC's sister corporation. (See letter brief of April 19, 1994 at page 7.)

The Sales and Use Tax Department (Department) contends that H--- acquired its right to purchase the inventory by oral assignment of MDC's contract right created by the December 7, 1990, letter agreement. It is argued that the bank did not take possession of the inventory but merely accepted the draft of H--- in satisfaction of the inventory lien obligation.

It is undisputed that substantial inventory was shipped to the Arizona business location of H--- by common carrier. MDC was listed as the shipper on the bill of lading and H--- was listed as the consignee. MDC explains that the listing of MDC as the shipper was an error and that H--- was the actual shipper of the inventory.

MDC's representative has submitted a number of letters and documents in support of its petition for redetermination. These are contained in a brief dated April 19, 1990 with Exhibits A through N, a copy of which has been made a part of the petition files of MDC and H---.

The petitioners have also listed a number of alternate grounds for the granting of their petition for reconsideration. These are set forth in the brief dated April 19, 1994, page 11 and following which is hereby incorporated herein by reference.

Petitioners' representative also represents the commonly owned corporation, H---. On behalf of H---, it is contended that the underlying facts are the same as set forth in the petition and brief for MDC. It is contended that H--- does not have any successorship liability because 1) It did not purchase a business or stock of goods from WEBM; 2) In any event it purchased the stock of goods from the S--- P--- B--- and not from the petitioners.

The Department has submitted evidence to show that the entire tax deficiency of the predecessor, WEBM, was incurred by its --- ---, California location. This is contained in a letter from Gerald L. Davenport, District Principal Business Taxes Compliance Supervisor to G--- & S---, Attorneys at Law dated April 7, 1994.

Analysis & Conclusions

M--- D--- C---, Inc.'s Petition

A. The claim that MDC did not purchase WEBM's stock of goods.

It is our conclusion that MDC is not entitled to relief on the grounds that it did not make a purchase of a stock of goods from WEBM. MDC's representative is simply incorrect in arguing that the completion of the sale was contingent upon MDC obtaining a new lease from the owner of the business premises. In this regard the December 7, 1990 letter provides as follows:

“5. WEBM shall use its best efforts to assist ATKO (MDC) in obtaining a new lease on the --- --- facility from the owner of the property. ATKO desires to enter into a two-year lease rather than assume the current lease which has approximately four years remaining. ATKO will agree to pay the same monthly rental as now paid by WEBM.”

While MDC was not successful in obtaining a new lease for a two-year term, it did enter into possession of the premises and paid rent to the landowner on a month-to-month basis while it operated from that location.

The records of S--- P--- B--- also support the finding that there was a completed sale to MDC. (See particularly Exhibits G and I attached to petitioners' brief dated April 19, 1994.)

MDC places great reliance on the letter prepared by F--- G--- of S--- P--- B--- C--- Inc. to J-- K---, Branch Manager, S--- P--- B--- Arizona which directed the bank to "turn-over the UCC-2 release to D--- or B--- A--- or designated parties" upon receiving a cashier's check for \$151,825.30, and the undisputed fact that the actual draft received in payment was drawn against the account of the sister corporation, H---. Each of these events are, however, entirely consistent with an assignment of MDC's right to purchase the inventory or a purchase by MDC for resale to the sister corporation, H---.

It is incredulous to argue that H--- separately entered into a new contract with the bank when both corporations were commonly owned and one already held the right to purchase. The evidence does establish that the sale was actually completed for the exact cash consideration previously negotiated by MDC. Under the circumstances, why was there any reason to negotiate with the bank?

The evidence supports a finding that MDC took possession of the inventory and shipped to H---. In our view the preponderance of the evidence supports the Department's conclusion that MDC purchased the stock of goods.

B. The claim that the cancellation of the initial billing was a final determination of MDC's successorship liability.

The initial cancellation of the successorship billing did not amount to a binding administrative determination because it did not represent a redetermination by the Board. A notice of this type does not create or extinguish the obligation but merely provides notice thereof. (See discussion in People v. Buckles, 57 CA2d 76, 80 (1943).)

The administrative agency is authorized to correct an error and issue another notice of successorship liability so long as the action does not violate the time limitation provisions set forth in the statute. In this case the new notice of successorship liability was issued within the limitation period. (See Revenue and Taxation Code section 6814(a).)

C. The claim that MDC did not purchase WEBM's business.

It is our conclusion that the petitioner, MDC, acquired all of the necessary assets for the continuation of a going business by virtue of the December 7, 1990 contract with WEBM. We do agree, however, that no specific consideration was allocated to the business.

The principal consideration was \$149,425.30 paid for the on-site inventory which constituted a stock of goods which of itself is an independent basis for classifying a purchaser as a successor for purpose of determining successorship liability under the statute. (See Revenue and Taxation Code sections 6811 and 6812.)

H---'s Petition

A. The claim that H--- purchased the goods from the bank.

Our conclusions on the companion petitioner are equally applicable to this matter. The preponderance of the evidence supports a finding that H--- acquired its right to purchase the inventory from MDC and not from the bank. There is no evidence that the bank sought a writ of possession or assumed any control over the goods. Its interest was a mere lien interest and not an ownership. Payment, therefore, did not result in a sale but merely discharged the lien. The consideration paid over was precisely the amount that MDC had previously negotiated and WEBM had agreed to.

In sum, it is our conclusion that MDC acquired WEBM's interest in the property pursuant to the letter agreement of December 7, 1990. This ownership interest was transferred to H--- in exchange for the payment discharging the lien held by the bank.

B. The claim that the commerce and due process clauses bar the imposition of successorship liability against H---.

If there was a sale by WEBM directly to H---, this sale would have been a local event because under the sales and use tax law the place of sale is the place where the property was located at the time of the sale. (See Revenue and Taxation Code section 6010.5). The statutes and ruling case law do not require a series of sales to an out-of-state buyer before jurisdiction to tax is acquired. The successorship provisions of California Revenue and Taxation Code sections 6811 and 6812 apply because the purchase would have been made in this state. There is no evidence that such application would discriminate against interstate commerce or unduly burden the commerce. The application therefore would not violate the commerce clause. (ADD Citation)

The state clearly has the right to apply successorship provisions to a retail sale taking place in this state without reference to the business location of the buyer. There is a sufficient local activity. Therefore the application would not violate constitutional requirements of due process of law or equal protection.

C. The claim that the Board could not assert a lien on WEBM's goods.

The State Board of Equalization had the right to a perfected state tax lien for any amounts that were due and payable from WEBM. (See California Revenue and Taxation Code section 6757.) We do agree, however, that the state tax lien would not take preference over a security interest recorded or perfected prior to the effective date of the state tax lien. (See California Revenue and Taxation Code section 6756.)

D. The claim that H--- did not purchase WEBM's stock of goods.

The evidence simply does not support the claim that the goods were abandoned by WEBM. Aside from the act of payment, all of the documents and the action taken were consistent with the Department's claim that the goods were acquired pursuant to contract and for the precise sum which MDC agreed to pay WEBM.

The bulk sale of inventory of a value of \$149,425.30 clearly amounted to a sale of a stock of goods.

E. The claim that the staff has collected some of the tax liability from WEBM.

Any payments made for the account of the taxpayer, WEBM, will be credited to the successorship liability accounts.

Other Matters

It is also contended that all evidence collected by the staff which the staff failed to turn over to petitioners should be disregarded.

We understand that the petitioners have received copies of all documents and writing secured by the staff except for handwritten notes which were not retained. There is no statute or regulation that requires the retention of the notes. The Department has offered the petitioners the alternative of examining the employees.

We cannot conclude that any evidence or information has been withheld from the petitioners.

Recommendation

1. It is recommended that the petition for reconsideration of MDC be denied.
2. It is recommended that the petition of H--- be held in abeyance pending a final administrative adjudication of the petition of MDC.

W. E. BURKETT, SENIOR STAFF COUNSEL

6-8-94

DATE