

STATE OF CALIFORNIA

535.0060

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Reconsideration of Successor)	DECISION AND RECOMMENDATION
Liability for State and Local)	
Sales and Use Taxes of:)	
)	
M--- G---)	No. SY -- XX-XXXXXXX-010
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Staff Counsel John Frankot on August 3, 1994 in Hollywood, California.

Appearing for Petitioner:

G--- H. K---
Attorney at Law

Appearing for the Sales and
Use Tax Department (SUTD):

Hiram Fernandez
District Principal Compliance
Supervisor

James Han
Senior Tax Representative

Protested Item(s)

The protested tax liability for the period October 1, 1989 through January 13, 1992, for liabilities of D--- L--- O---, is:

<u>Item</u>	<u>Tax</u>
Successor liability for the \$5,000 price of the business, plus \$4,300 per month rent for the period from May 1993 to September 1993.	\$ 23,917.48

Petitioner's Contentions

1. Petitioner is not a successor in interest as he did not purchase a business or stock of goods.
2. Petitioner has no knowledge of the correctness of the determination because he did not purchase the prior business, nor was he a successor in interest.
3. Even if petitioner is liable as a successor, he is not liable for penalties.

Summary

D--- L--- O--- (O---) took out a permit as an individual, dba J--- S--- R--- (SR -- XX-XXXXXX), start date August 21, 1987, to operate a jewelry store at the B--- Hotel in Los Angeles. It appears that O--- at that time also controlled a corporation called J--- S--- R--- Inc., which did business throughout the U.S. This business was in Chapter 7 Bankruptcy in 1992. Included in the corporation's assets were certain items of furniture, fixtures, equipment and inventory used by O--- in his individual business. By order entered April 5, 1992 a partnership of petitioner and J--- K. A--- purchased the aforementioned assets of "J--- S--- Inc.", as is, "located at the B--- Hotel in Los Angeles, California", from the bankruptcy trustee. The partnership obtained its own lease of the B--- premises and operated a jewelry store under permit number SX -- XX-XXXXXX for several months. Then, O--- petitioned the court for relief of judgement or order of assumption by the trustee of the unexpired portion of the lease for the B--- premises; the motion was granted because the court ruled that O---, not the bankruptcy debtor, was the lessee.

O--- forced the partnership out of the business, and subsequently opened "W--- A--- S---", a sole proprietorship, (SR -- XX-XXXXXX, start date June 4, 1992) at the same location. O--- had difficulty staying in business, wanted out, and arranged for petitioner to move in to the business location in June 1993. Petitioner bought O--- out by forgiving a \$5,000 debt owed to him by O--- and by assuming O---'s lease from May to September 1993, after which he renegotiated his own lease. Petitioner operated as an individual under his own permit (SY -- XX-XXXXXX) dba "M—F---".

SUTD contends that petitioner purchased a jewelry business from O--- without a certificate of payment. O--- had outstanding liabilities (as an individual) under SR -- XX-XXXXXX, J--- S--- R---, for the period October 1, 1989 to January 13, 1992 totaling \$38,061.49. A Notice of Successor Liability was issued to petitioner on August 23, 1993. SUTD contends that in addition to the \$5,000 "purchase price", petitioner should be liable for rent payments of \$4,300 per month that he made to the landlord from May through September 1993 (total \$26,500) on behalf of O---.

Petitioner states that he believed he already owned the fixtures and equipment from the trustee sale, and that in the circumstances he didn't have the resources or the inclination to fight O---. Petitioner states that there is no proof that the landlord agreed to a sub-lease; however petitioner does admit to canceling a \$5,000 debt owed to him by O---. It is assumed that because O--- took the premises back from petitioner in 1992 that O--- had to compensate petitioner for the fixtures and equipment left on the premises; it is assumed that the \$5,000 debt forgiveness relates to this.

SUTD collected approximately \$5,000 from petitioner during July 1993, when a keeper was placed on the business premises (see Exhibit A), for which petitioner filed a claim for refund dated December 15, 1994 (SR AS 18-739146/001). A separate Decision and Recommendation will be issued on the claim for refund.

ANALYSIS AND CONCLUSIONS

Revenue and Taxation Code Section 6811 provides that when a person with a sales or use tax liability sells a business or stock of goods or quits business, the successor shall withhold an amount from the purchase price sufficient to cover the tax liability, unless a receipt or certificate is obtained from the Board stating that no such debts exist. Section 6812 provides that failure to obtain a certificate and withhold the liability from the purchase price renders the purchaser personally liable to the extent of the purchase price. Sales and Use Tax Regulation 1702, which implements Sections 6811 & 6812, provides that the purchaser/successor will also be released if he makes a written request to the board for a certificate.

There is no evidence that petitioner purchased O---'s first business, "J--- S--- R---". Petitioner only purchased corporate assets from the bankruptcy trustee, and the duty of a purchaser to withhold from the purchase price of a business to cover the tax liability of the seller does not arise in connection with sales by trustees in bankruptcy (Regulation 1702(a)). Petitioner commenced his own business, "M--- F---", after O--- wanted out of his second business, "W--- A--- S---". Petitioner is not a successor to O---, dba "J--- S--- R---", and cannot be held liable for O---'s debts incurred in that business.

Recommendation

Grant the petition. The claim for refund will be covered by a separate Decision and Recommendation.

JOHN FRANKOT, Staff Counsel

Date

Attachment: Exhibit A