

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the matter of the Petitions for)
 Redetermination Under the Sales) DECISION AND RECOMMENDATION
 and Use Tax Law of:)
)
)
Petitioner)

The Appeals conference in the above-referenced matters was held by Carl J. Bessent, Staff Counsel, on May 5, 1994 in Sacramento, California.

Appearing for Petitioner: Appearing waived

Appearing for the
 Sales and Use Tax Department: John Duncanson
 Supervising Tax Auditor

Protested Items

The protested tax liability for the period April 1, 1987 through September 30, 1990 is measured by:

<u>Items</u>	<u>State, Local and County</u>
1. Claimed exempt resales disallowed based on test	\$1,265,321*

*Petitioner disagrees with one disallowed claimed sale for resale of nails and staples to the _____ in the amount of \$5,314. The projection of this error results in claimed exempt sales disallowed in the amount of \$229,475 for the audit period.

Measure of tax per original audit	\$2,582,473
Reaudit adjustments	-435,100
Measure of tax per reaudit of 2/21/92	<u>\$2,147,373</u>

2. Liability due as a successor to _____ account number _____.

Amount of tax	\$5,401.02
10 percent penalty under Revenue and Taxation Code Section 6565	540.10

Note: liability was paid in full by petitioner. Overpayments made by petitioner toward the Notice of Determination of September 20, 1991 (regarding _____) were applied toward the Notice of Successor's Liability of December 24, 1991. The balance of overpayments with interest was refunded to petitioner.

Petitioner's Contentions

1. Petitioner contends that a resale certificate issued by the _____ was taken timely. Therefore, the sale to _____ should be accepted as a valid sale for resale.
2. Petitioner purchased only the assets of _____ located in Indiana and Toronto, Canada. No California assets were purchased. Petitioner should not be held liable for California taxes as a result of the assets purchased.

Summary

Petitioner is a corporation that manufactures and distributes fastening supplies including nails, staples, tools and repair parts. There was no prior audit.

Issue 1 – Resale Certificate

Petitioner and the Sales and Use Tax Department (Department) agreed to a one month test to be projected over the audit period. On March 16, 1990, petitioner sold products to _____ for a total of \$5,313.70. With a check dated April 18, 1990, _____ paid for the products. On May 17, 1990, _____ issued a blanket sales and/or use tax exemption certificate to petitioner that was date stamped June 4, 1990.

Petitioner argues that the resale certificate issued by _____ was taken timely. The resale certificate dated May 17, 1990, was just 62 days after the date of sale of March 16, 1990. Petitioner contends that the 62 days falls within a reasonable time frame with its normal billing and payment cycle of 58 days. Petitioner requests that the _____ transactions be removed from the test.

The Department contends that the resale certificate issued by _____ was not timely provided. The resale certificate was stamped as received June 4, 1990, which was 79 days after the sales transaction occurred.

The Department argues that petitioner should have known that _____, a chain of supermarkets, was a consumer of the nails and staples in question, which were billed to _____. _____ uses these items for the construction of pallets which it used in its business operations. In accordance with Sales and Use Tax Regulation 1668(d) petitioner should have required a resale certificate describing the specific property being purchased for resale.

Unidentified _____ personnel informed the Department that the nails and staples were for _____ own use. Also, _____ did not report the purchases as subject to use tax. An XYZ letter was sent to _____ for completion, but _____ did not return it.

Analysis and Conclusion

All gross receipts from the sale of tangible personal property are presumed to be subject to tax. The seller has the burden of proving that the sale is not a retail sale unless the seller takes a valid resale certificate from the purchaser (Revenue and Taxation Code Section 6091; Regulation 1668). Regulation 1668(a) (1) provides that the resale certificate must be taken timely and in good faith.

Petitioner provided the staff a blanket resale certificate from _____ dated May 17, 1990. To be timely, the resale certificate must be taken before the seller bills the purchaser, or within the seller's normal billing and payment cycle, or prior to delivery. To be timely, petitioner should have received the blanket resale certificate within petitioner's normal billing and payment cycle. Petitioner's normal billing cycle was 58 days. The _____ blanket resale certificate was not received by petitioner until 79 days after the sales transaction. We must conclude that petitioner did not timely receive the resale certificate from _____.

Even if the resale certificate was timely, petitioner must establish its good faith when accepting the certificate on which it relies. "Good faith" within the meaning of the requirements of Regulation 1668 requires at a minimum that the person seeking to rely on the resale certificate have no reason to believe that the items sold under that certificate were consumed rather than resold prior to use. Regulation 1668(d) states:

"A seller will be presumed to have taken a resale certificate in good faith in the absence of evidence to the contrary. If the purchaser insists that the purchaser is buying for resale property of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business."

Based on the fact that _____ a chain of supermarkets, consumed nails and staples for the construction of pallets used in business operations, petitioner had a duty to inquire further in "good faith" if it sought to rely on the resale certificate. Petitioner should have required _____ to include a statement that the specific property it purchased was for resale in the regular course of business. We conclude that petitioner's failure to affirmatively establish its good faith when accepting the certificate from _____ prevents the granting of relief petitioner seeks.

Regulation 1668(c) states in pertinent part that if a seller does not timely obtain a valid resale certificate, then the seller will be relieved from liability for the sales tax only if the seller presents satisfactory evidence that the specific property sold:

“(1) Was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

“(2) Is being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

“(3) Has been used or consumed by the purchaser and the purchaser has paid the use tax directly to this State.”

Petitioner submitted no evidence to show that any of the circumstances of subdivision (c) of Regulation 1668 were met. Without such, the Department properly disallowed the claimed sale for resale. In fact, _____ personnel informed the Department that the nails and staples were for _____ own use and _____ did not report the purchase as subject to use tax. Furthermore, an XYZ letter was provided to _____ but was not returned. Therefore, we find that petitioner has not met its burden of proof.

Issue 2 – Successor Liability

Petitioner states that it purchased only the assets located in Indiana and Toronto, Canada of _____ on or about December 31, 1988. The assets of _____ California warehouse were not included in the sale. Petitioner does not know what happened to the California assets and inventory. Liability is that of the former owners not petitioner. Petitioner does not dispute that “substantially all” the assets of _____ were transferred.

_____ was a manufacturer and seller of fastening devices and related tools. _____ had a warehouse/sales office located in Torrance, California.

The Department states that the assets purchased by petitioner were “substantially all” of the assets of _____. The California warehouse/sales office apparently was not included in the sale to the petitioner. The warehouse/sales office was close on or about December 30, 1988. Petitioner did not obtain a certificate from the Board stating that no taxes, interest, or penalties were due from _____. Thus, petitioner is liable as a successor. It is the Department’s position that successor’s liability can be asserted against a purchaser “engaged in business in this state” who purchases a business or stock of goods from a seller who was also “engaged in business in this state”, even though the purchase did not include California assets.

Furthermore, the Department contended that as a retailer engaged in business in this state, _____ was required to collect tax on all retail sales, regardless of whether the goods were shipped from California inventory or Indiana inventory. The Department believes that this requirement to collect and pay the tax to the state passes onto the purchaser of the business. The fact that petitioner did not purchase the assets of the California warehouse had no bearing on successor’s liability.

Analysis and Conclusion

The relevant authority regarding successor’s liability is Section 6811, et seq. If a person purchases a business or stock of goods from a retailer who was selling a business or stock of goods or who was quitting business, while owing amounts due under the sales and use tax law,

that purchaser was required to withhold a sufficient amount from the purchase price to cover such debts of the retailer unless the purchaser obtained a receipt or certificate from the Board stating that no such debts existed (see Section 6811; People v. Buckles (1943) 57 Cal.App.2d 76, 79). If the purchaser failed both to obtain a receipt/certificate and to make such a withholding, it is personally liable to the Board for payment of the amount required to have been withheld to the extent of the purchase price (Section 6812). Successor liability is a separate and independent liability of a purchaser arising from the failure to withhold funds from the purchase price (Knudsen Dairy Product Co. v. State Board of Equalization (1970) 12 Cal.App.3d 47, 52).

Successor liability can arise from the purchase of a substantial portion of business or stock of goods, not just the entire amount of either or both (Regulation 1702(f)). However, successor liability does not arise merely from the purchase of fixed assets from another business (Section 6812; see also People v. Gabriel (1943) 57 Cal.App.2d 788).

It is our conclusion that petitioner is responsible for successor liability. Petitioner acquired substantially all the business assets of _____ without actually formally acquiring the business itself or California assets. _____ owed tax to the Board. Petitioner did not obtain a clearance certificate from the Board. Petitioner did not withhold money from the purchase price to cover _____ debt. Both _____ and petitioner were engaged in business in California, and the Board, due to the sale, could collect from _____ successor. Thus, petitioner is separately liable to the Board for successor liability even though no California assets were purchased, because _____ was engaged in business in California and owed tax.

Section 6565 provides for a ten percent penalty if a determination is not paid when due and payable. Section 6814 provides in relevant part that if the purchaser's failure to withhold a sufficient amount to cover the tax owed by the former owner is due to reasonable cause, and circumstance beyond the purchaser control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect, that person may be relieved from any penalty imposed on the predecessor. In order to be relieved from the penalty, the purchaser must provide a statement under penalty of perjury that sets forth the facts why that person should be relieved from the penalty. Without the appropriate statement, as required by Section 6814, relief from the penalty cannot be considered. The appropriate statement asking for relief from the penalty could be filed as a request for reconsideration.

Recommendation

Deny the petitions.

Carl J. Bessent, Staff Counsel

6/2/94
Date