

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for)
Reconsideration of Successor's) DECISION AND RECOMMENDATION
Liability Under the Sales and)
Use Tax Law of:)
)
Petitioner _____)

The Appeals conference in the above-referenced matter was held by Paul O. Smith, Staff Counsel on March 23, 1994, in Sacramento, California.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department: Robert O. Colivas
Tax Compliance Supervisor

Roger Schwarting
Senior Tax Representative

Protested Item

The protested tax liability for the period April 1, 1992 through December 31, 1992, is measure by:

<u>Item</u>	<u>Amount</u>
Liability due as a successor to account number _____	\$557,412

Petitioner's Contentions

Petitioner contends that she is not subject to successor's liability because she did not purchase the business or stock of goods of the predecessor. Petitioner also contends that this matter is without any legal basis at all, and is being pursued out of malice, ill will, and spite.

Summary

In November 1992, _____ ceased the operation of his business at _____. In this month _____'s former employee, petitioner _____ secured a seller's permit and commenced the operation of a similar business at the same location. Petitioner operated her business under the

name _____ and did auto window tinting. Petitioner also engaged in the sale and installation of auto alarms and auto stereos to individuals and auto dealerships, as well as the sale of auto accessories and auto sun roofs. According to an unexecuted "Standard Sublease" provided by petitioner, on November 20, 1992, petitioner entered into a sublease agreement for the premises with _____ and _____. The agreement shows petitioner's rent was \$5,600 per month, payable in weekly payment of \$1,400. Though the landlord is not a party to this sublease or consented to its execution, the landlord accepted the rental payments by petitioner.

Petitioner states that she did not purchase _____'s inventory or fixed assets, and _____ did not leave any of these items at the premises. Petitioner further states that she has not paid any of _____'s liabilities.¹ On May 23, 1994, petitioner provided copies of invoices that shows she purchased goods from _____ (hereinafter _____) under her dba name _____.² Also included was a letter dated July 22, 1993, from _____ to Mr. Colivas that acknowledged _____ knew that _____ changed owners as well as [its] business name." (See Exhibit A.)

On April 13, 1993, Mr. Colivas requested the issuance of a successor billing to petitioner. Mr. Colivas made this request because:

"1. _____ owed delinquent taxes for the 2nd and 3rd quarters of 1992. When the Board began pursuing collection action he closed out his permit. Effective the next day, _____ [petitioner] applied for a permit in her name changing the DBA from _____ to _____.

"2. _____ and _____ are boyfriend/girlfriend.³

"3. _____ is still working in his business. An EWO has been sent but no response has been received, (we may refer this to the AG [Attorney General]).

"4. _____ is dealing with some of the same suppliers.

"5. The telephone number for the business did not change.

"6. Radio advertisements on FM 96.9 state _____ is now _____.

"7. The business sign still reads _____ as of April 5, 1993."

On May 13, 1993, the Sales and Use Tax Department (Department) issued a Notice of Successor's Liability to petitioner, and on June 10, 1993, petitioner submitted a timely Petition for Reconsideration.

¹ A letter dated January 28, 1993, from Mr. Robert O. Colivas, Tax Compliance Supervisor for the State Board of Equalization (hereinafter "Board") requested petitioner to post a \$1,000 bond. Petitioner posted a \$1,000 cash bond, and on February 24, 1994 (when I believe she quit the business), instructed Mr. Colivas to apply the \$1,000 against the outstanding tax balance of _____.

² In a letter dated December 1, 1992, _____ advised petitioner that her line of credit would be \$1,500, subject to review in 90 days. A _____ invoice dated December 21, 1992, acknowledged that _____ was previously _____.

³ _____'s ex-wife (_____) is employed by the Board at the office where petitioner applied for her seller's permit. Petitioner claims that the location of petitioner's business was brought to the Board's attention by _____'s ex-wife. Mr. Colivas, however, states that he reviews all applications, and he was aware that the business address of _____ and _____ were the same.

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 the business, his 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 liability existed. (See People v. Buckles (1943) 57 Cal.App.2d 76.) Section 6812 provides in relevant part that failure to obtain this documentation and to withhold the liability from the purchase price renders the purchaser personally liable for payment of the liability to the extent of the purchase price. (See also Cal. Code Regs., tit 18, reg. 1702.)

When a statute seeks to impose the tax liability of one person on another to facilitate its collection, the tax laws are to be strictly construed in favor of the taxpayer. (See Knudsen Dairy Products Co. v. State Bd. of Equalization (1970) 12 Cal.App.3d 45, 52-53.) To hold petitioner personally liable for _____ tax liability under sections 6811 and 6812, it must be established that petitioner was a purchaser of _____ business. Absent the relationship of buyer and seller petitioner would not be in a position to withhold a sufficient amount of the purchase price to satisfy _____ tax liability. (Id. at 53.)

Here, petitioner states that she did not purchase _____ inventory or fixed assets, and that _____ did not leave these items at the premises. There is no evidence of an express or implied agreement of sale between petitioner and _____ regarding the business.⁴ In a purchase and sale, the purchase price need not necessarily flow directly to the seller. The buyer can make payment of the purchase price to some creditor or obligor of the seller, or assume some liability or obligation of the seller. Here, there is no evidence of the payment of the debts or obligation of _____ or the assumption of _____ liabilities by petitioner. Though petitioner applied her \$1,000 security deposit to _____ tax liability, I believe this occurred because of their relationship, not as a payment for the business. While it is true tat the day after _____ closed out his permit, petitioner applied for a seller's permit in the name _____.⁵ I do not consider this to be evidence of petitioner's purchase of the business. Neither is the alleged relationship between petitioner and _____ evidence of petitioner's purchase of the business.

The Department has interpreted the fact that _____ is still working in his business; that petitioner dealt with some of _____'s suppliers; that the business telephone number remained unchanged; that radio advertisements merely showed a name change from _____ to _____; and that the business sign still reads _____ as evidence that the petitioner purchased the business. These facts suggests to me that possibly petitioner is the alto ego of _____, and not a successor to his business. Since there is no purchase price from which petitioner could withhold the tax liability owed by , I must conclude that sections 6811 and 6812, as interpreted by Title 18, California Code of Regulation 1702, are not applicable. (See also Knudsen Dairy Products Co. v. State Bd. of Equalization, supra, 12 Cal.App.3d at 53.) Further, since I have reached this

⁴ Section 6006 provides in relevant part that the term "sale" means any transfer of title or possession of tangible personal property for a consideration. (See also Rev. & Tax. Code, § 6010 which provides a similar definition for the term purchase.)

⁵ It is my understanding that each application for a seller's permit asks the applicant whether he or she is "buying a business". If the reply is yes, the name and account number of the former owner, the purchase price, and value of fixtures and equipment must be given. I assume from the Department's silence that petitioner did not answer this question in the affirmative.

conclusion I need not address petitioner's argument that the Department's pursuit of this matter arises from malice, ill will, and spite.

Recommendation

Grant the petition.

Paul O. Smith, Staff Counsel

7/15/94
Date