



STATE 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:)	
)	
<u>Petitioners</u>)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Michele F. Hicks on January 5, 1994 in San Diego, California.

Appearing for Petitioners:

Appearing for the	
Sales and Use Tax Department:	Wolfgang P. Weichert Tax Compliance Specialist

Protested Item

Petitioners protest the assertion of successor liability in the amount of \$681.76 tax for the period July 1, 1990 through January 31, 1991 for unreported sales of _____.

A 10 percent penalty for the predecessor's failure to file a return for fiscal year 1990-91 and a 10 percent finality penalty have been assessed for a total of \$136.35

Petitioners' Contention

Petitioners did not purchase the business from the predecessor; they reacquired the business through a foreclosure.

Summary

Petitioners own and operate a car wash under the dba _____. _____ initially entered into a ten-year lease of the property on January 3, 1989. He also signed a personal guarantee for the full performance of the lease terms. Petitioners then constructed a car wash on the property and sold the car wash and sublet the premises to _____ and _____ in June 1990.

_____ subsequently transferred the lease to _____. The corporation began missing payments and filed for bankruptcy. _____ turned the equipment back to the petitioners and the

premises back to the landlord in January 1991. _____ did not report or pay any sales tax during the approximate six-month period in which he operated the car wash.

In order to operate the business at the new location, petitioners paid the landlord \$35,636.88 in back rent owed by _____ and _____. The Board staff contends that successor's liability should apply on petitioners' assumption of this liability.

Petitioners contend that the \$35,636.88 they paid the landlord for back rent was not an assumption of the liability of _____ and _____. The payment of \$35,636.88 was made to pay their own lease obligation as prime lessee.

Petitioners have submitted a copy of the lease signed by _____. Paragraph 15.2 of the lease provides in pertinent part:

“Subletting. Tenant shall be entitled, with the prior written consent of Landlord, such consent not to be unreasonably withheld, to sublet the entire leased premises and to collect and retain rentals therefrom. Tenant shall, at all times, remain liable for the performance of all covenants on its part to be so performed, notwithstanding any subletting.”

In addition, petitioners submitted a personal guarantee signed by _____ on January 3, 1989, in which he “unconditionally guarantees the full performance of each and every term, condition and covenant of Lease to be performed by Tenant, including the payment of all rent...”

Analysis and Conclusions

Revenue and Taxation Code Section 6811 provides:

"Withholding by purchaser. If any person liable for any amount under this part sells out his business or stock of goods or quits the business, his successors or assigns shall withhold sufficient of the purchase price to cover such amount until the former owner produces a receipt from the board showing that it has been paid or a certificate stating that no amount is due."

Sales and Use Tax Regulation 1702(a) provides:

"WHEN DUTY TO WITHHOLD PURCHASE PRICE ARISES. The requirement that a successor or purchaser of a business or stock of goods withhold sufficient of the purchase price to cover the tax liability of the seller, arises only in the case of the purchase and sale of a business or stock of goods under a contract, providing for the payment to the seller or person designated by him of a purchase price in money or property or providing for the assumption of liabilities and only to the extent thereof, and does not arise in connection with other transfers of a business such as assignments for the benefit of creditors, foreclosures of mortgages, or sales by trustees in bankruptcy."

We agree with petitioners that the \$35,636.88 which they paid in back rent was a settlement of their own liability under the lease and not assumption of the liability of _____ and _____. Paragraph 15.2 of the lease provides that the tenant, _____, would remain liable on all the terms of the lease even if the premises were sublet. In addition, _____ signed a personal guarantee in which he guaranteed the full payment of all rent due. Since there was no assumption of liabilities or other consideration, there was no sale or purchase of a business or stock of goods. Accordingly, successor's liability does not apply.

Recommendation

Cancel the determination.

Michele F. Hicks, Staff Counsel

2/4/94
Date