

## STATE OF CALIFORNIA

## BOARD OF EQUALIZATION

## BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the petition )  
 for Reconsideration of ) DECISION AND RECOMMENDATION  
 Successor's 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 September 15, 1993, in \_\_\_\_\_ California.

Appearing for Petitioner: No Appearance

Appearing for the  
 Sales and Use Tax Department: David Mayo  
 Senior Tax Representative

Protested Item

The protested tax liability for the period January 1, 1988 through October 13, 1989, is measured by:

<u>Item</u>	<u>Amount of Tax</u>
Tax liability due as a successor to account number _____ The finality penalty imposed is also protested.	\$14,244.27

Petitioner's Contentions

Petitioner contends that its letter of March 13, 1990, satisfied the notice requirements of Revenue and Taxation Code Section 6812; and consequently, since the State Board of Equalization (Board) did not issue a clearance certificate or a notice of the amount of tax due within 60 days of the letter, petitioner was relieved of its obligation to withhold the amount from the purchase price. Petitioner also contends that it should be relieved of the liability for the

finality penalty imposed on the predecessor since payment of the liability was beyond the control of petitioner.

### Summary

On October 13, 1989, petitioner \_\_\_\_\_ (at the time a subsidiary of \_\_\_\_\_ now \_\_\_\_\_) purchased the assets, inclusive of the right to do business as “\_\_\_\_\_”, of \_\_\_\_\_. Thereafter, \_\_\_\_\_ ceased to do business, and a final return was submitted by petitioner on behalf of \_\_\_\_\_ together with correspondence dated March 13, 1990 (Exhibit A). Petitioner's correspondence advised the Board that the return was for the period October 1, 1989 through October 12, 1989; that taxes due for the subsequent period(s) would be included in petitioner's return(s); and that by agreement payment of the sales tax related to the purchased assets was the responsibility of petitioner. The Board was requested to contact petitioner should any additional questions arise. On September 13, 1990, the Board sent a letter to petitioner (as \_\_\_\_\_) requesting the following information for the purpose of either closing out the account of \_\_\_\_\_, or to release security, or to issue an escrow clearance:

1. Date business was sold, name of purchased, and total sales price;
2. Copy of escrow instructions or bill of sale;
3. Location of books and records for audit purposes; and
4. Daytime phone number or address of the seller.

This information was provided by petitioner on September 28, 1990.

The Sales and Use Tax Department (Department) examined the records of \_\_\_\_\_ and on April 12, 1991, issued a close-out audit report indicating an additional tax liability of \$14,244.27.<sup>2</sup> On May 15, 1991, the Department issued a Notice of Determination to \_\_\_\_\_ for this amount. On December 4, 1991, the Department issued a Notice of Successor Liability to petitioner for the tax determined by the examination of \_\_\_\_\_ inclusive of a 10-percent penalty. On January 2, 1992, petitioner timely submitted its Petition for Redetermination, and requested waiver of the penalty.

### Analysis and Conclusion

Revenue and Taxation Section 6811 provides that when any person liable for the sales or use tax sells his business or stock of goods or quits the business, his successors or assigns shall withhold a sufficient amount of the purchase price to cover the amount of tax owed until the former owner produces a receipt from the Board showing that the tax has been paid or a certificate showing that no amount of tax is due. Section 6812 provides that if the purchaser fails to withhold from the purchase price the amount required by Section 6811, he or she becomes personally liable for payment of the amount required to be withheld by him or her to the extent of the purchase price, valued in money. This section also provides that within 60 days of the latter of: (1) the date the Board receives a written request for a certificate from the purchaser; (2)

the date of the sale of the business or stock of goods; or (3) the date the former owner's records are made available for audit, the Board shall either issue a certificate or give notice to the purchaser of the amount that must be paid as a condition of issuing the certificate specified in Section 6811. The failure of the Board to mail this notice will release the purchaser from any further obligation to withhold from the purchase price as above provided. (See also Sales and Use Tax Reg., § 1702.)

Here, petitioner does not dispute that it is the successor to the business of \_\_\_\_\_; petitioner argues that its letter of March 13, 1990, was sufficient to constitute a request for a tax clearance as required by Section 6812. I disagree. My interpretation of Sections 6811 and 6812 leads me to conclude that a taxpayer's request to the Board for a certificate that no taxes, interest or penalties are due from the seller must be clear and unambiguous. Nowhere in petitioner's letter to the Board is there an express or implied request for such a certificate. The letter merely puts the Board on notice that petitioner has purchased the assets of \_\_\_\_\_. This clearly does not satisfy the requirements of Sections 6811 and 6812. It is well settled that Sections 6811 and 6812 were enacted to prevent a seller who has failed to pay the state all of the taxes due from the sale of his or her business from departing with the full purchase price. (See Knudsen Dairy Products Co. v. State Bd. of Equalization (1970) 12 Cal.App.3d 47, 52, citing People v. Buckles (1943) 57 Cal.App.2d 76.) In People v. Buckles, the taxpayer purchased a business and withheld an amount as sales tax from the purchase price. This amount was paid to the Board. The taxpayer, however, did not request the former owner to produce a receipt from the Board that all taxes had been paid, or request a certificate from the Board that no taxes, interest or penalties were owed by the seller. The Board, dissatisfied with the returns filed by taxpayer, thereafter audited the records of the taxpayer, which resulted in additional assessments. The court, concluding that the subsequent assessments were proper, held that Section 26 (the predecessor to Sections 6811 and 6812) provided a method by which a taxpayer (purchaser) may protect itself from this withholding requirement by “[requiring] the seller to produce a receipt from the board showing that all taxes have been paid or a certificate stating that no taxes, interest or penalties are due, before turning over any part of the purchase price. This requirement is both simple and salutary.” (People v. Buckles, supra, 57 Cal.App.2d at 81.) Thus, since petitioner failed to protect itself by requiring \_\_\_\_\_ to produce a receipt from the Board that all taxes owed by had been paid, or to request a certificate from the Board that no taxes, interest or penalties were owed by \_\_\_\_\_, the Department properly imposed upon petitioner the statutory liability created by Sections 6811 and 6812.

I now address whether petitioner's request for relief of the penalty assessed should be granted. 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 circumstances beyond the purchasers 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.

On January 2, 1992, petitioner submitted a statement under penalty of perjury that states the circumstances for its failure to withhold a sufficient amount of the purchase price to cover the

amount of taxes, and interest owed by \_\_\_\_\_. Upon review of the statement, I find that the failure to withhold sufficient monies to cover taxes and interest owed by \_\_\_\_\_ was due to a belief that petitioner's letter of March 13, 1990, was sufficient notice to the Board. Thus, petitioner's failure to withhold the proper amount was due to reasonable cause and circumstances beyond its control, and was not due to willful neglect. Accordingly, I recommend that the penalty should be waived.

Recommendation

The penalty assessed should be waived, and the petition should be denied in all other respects.

\_\_\_\_\_  
Paul O. Smith, Staff Counsel

1/5/94  
Date