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Attorney General

STATE OF CALIFORNIA

Legal Department

San Francisco, August 21, 1941

State Board of Equalization
Sacramento, California

Attention Honorable Dixwell L. Pierce
Secretary

Gentlemen:

You have requested my opinion whether a partnership liability arose by reason of the following circumstances:

C was engaged in the business of selling new and used cars. On or about April 1, 1939, the assets of the business were turned over to a partnership composed of C and B. There was no written partnership agreement but it appears that the partnership assumed the "known" liabilities of C. There was no other consideration for the transfer of the assets of the individual to the partnership. The assets consisted of equity in new cars floored, used cars equipment, machinery, furniture and fixtures, some of which was clear of any encumbrance and a portion of which was covered by either a conditional sales contract or mortgage. Some of the liabilities of the individual were unsecured.

Notice of intended sale was recorded as provided by section 3440 of the Civil Code in connection with the transfer by the individual to the partnership.

After the partnership started operation an audit of the records of the individual was made and an assessment was levied for the period from April 1, 1937, to and including March 31, 1939.

The partnership paid various liabilities of the individual but not the assessment made by the State Board of Equalization. No receipt or certificate of the kind referred to in the fifth paragraph of section 26 of the Retail Sales Tax Act was obtained from the Board.

The partnership has been dissolved and the assets assigned to B and the liabilities of the partnership have been assumed by him.

C appears to be without sufficient assets to pay the tax. The contention is made that neither the partnership nor B is liable as a successor.

The fifth paragraph of section 26 of the Retail Sales Tax Act, at the time here pertinent read as follows:

> "If any retailer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assignors."

I am of the opinion that the formation of the partnership resulted in such a change of legal rights and relations that the partnership properly should be regarded as the successor of C for the purposes of the fifth paragraph of section 26 of the Act.

There has been much jousting between the entity and aggregate theories of partnership (Crane on Partnership (1938) pp. 8-16) and the Uniform Partnership Act (adopted in California in 1929) is said to be based partly upon the aggregate theory and partly upon the entity theory (Warren, Corporate Advantages without Incorporation, pages 293-301).

It has been said that in California the aggregate theory of partnership generally is applied, Reed v. Industrial Accident Commission, 10 Cal. 2d 191, 192, (but cf. National Automobile Ins. Co. v. Industrial Accident Commission, 11 Cal. 2d 689, 691, also the concurring opinion at pages 692, 693; National Automobile Insurance Company v. Industrial Accident Commission, 11 Cal. 2d 694). Nevertheless, for some purposes, a partnership is regarded as an entity. Most v. Passman, 21 Cal. App. 2d 729, 732, 20 Cal. Jr. 680.

It has been pointed out that the entity concept is but a convenient formula or metaphor to express the results of separation or insulation of group affairs so far as it goes and the various problems which arise as to how much separation there shall be in bankruptcy and in other situations must be worked out on their own merits. 17 Calif. L. Rev. 626.

I do not deem it necessary to pass upon what the result here would be under the aggregate theory since, in my opinion, the entity aspects of a partnership are the more closely related to the problem with which we are concerned and they warrant the treatment of the partnership as an entity successor to C.

A number of illustrations of the entity aspects of a partnership are set forth in 17 Calif. L. Rev. 623, 625-629. It is there pointed out that the Uniform Partnership Act for certain important purposes personifies the firm or its business and treats partnership rights and liabilities to some extent as if they were those of a distinct legal person.

The partnership is recognized as a legal unit or person for the purpose of acquiring and transferring both real and personal property by conveyances made in the partnership name. California Civil Code, Section 2402, 2404; 17 Calif. L. Rev., p. 627, Crane on Partnership, p. 143.

With respect to partnership property, a species of tenancy called "tenancy in partnership" is recognized, to which has been ascribed certain incidents of an entity nature. California Civil Code, Section 2419, 682 (2), 684. 17 Calif. L. Rev. 627.

The partnership is treated as a legal person or entity in that a separate creditor of a partner cannot attach or levy on specific partnership property. California Civil Code, Section 2419 (2) (c), 17 Calif. L. Rev. 627.

Another separate entity aspect of the partnership is the recognition that partnership creditors have priority over separate creditors with respect to partnership property. Civil Code, Section 2434 (h), Crane on Partnership, p. 405, 9 Calif. L. Rev. p. 405.

The Retail Sales Tax Act itself defines "person" to include a copartnership. Section 2(a).

I am of the opinion that it is consistent with the legislative intent disclosed by the fifth paragraph of section 26 to hold that the partnership was the successor of C and that it became liable for the tax.

In addition to the problem of whether the partnership is a successor, you ask if the assumption of liabilities and the payment thereof by the partnership constituted a failure "to withhold purchase money" within the meaning of the fifth paragraph of section 26 of the Act.

I am of the opinion that the words "purchase money" were used in the statute as the equivalent of "consideration."

Rohrbach v. Hammill, 143 N.W. (Iowa) 872, 874;

Johnson v. Tabor, 57 So. (Miss.) 365, 366

I see no justification in the statute for drawing a distinction between the situation where a buyer agrees to and does pay a sum of money to the seller who then pays the money over to his creditors and the short-cut method followed here where the buyer agrees to and does pay the money directly to the creditors of the seller.

The views already expressed make it unnecessary for me to pass upon the additional questions you raise as to whether the partnership became liable for the sales tax by reason of its assumption of "known" liabilities and whether knowledge on the part of C that he had not been reporting all of his receipts or paying his entire tax liability would be imputed to the partnership. I am of the opinion that, irrespective of the assumption of C's debts by the partnership, a partnership liability for the tax arose and is included in the partnership liabilities assumed by B.

Very truly yours,

EARL WARREN, Attorney General

By (s) James E. Sabine
James E. Sabine
Deputy

JES:VC