

STATE OF CALIFORNIA

170.0045

BOARD OF EQUALIZATION

In the Matter of the Petition)	DECISION AND RECOMMENDATION
for Redetermination Under the)	
Sales and Use Tax Law)	
)	
REDACTED TEXT)	REDACTED TEXT
)	
<u>Petitioner</u>)	

The preliminary hearing on the above taxpayer's petition for determination was held on December 29, 1987, in Sacramento, California.

Hearing Officer:	W. E. Burkett
Appearing for Petitioner:	REDACTED TEXT Attorney
Appearing for the Board:	Robert L. Buntjer Supervising Tax Auditor

Protested Items

Petitioner has filed a written petition for redetermination dated April 1, 1987. The protested tax liability for the period April 1, 1986 through September 30, 1986 is measured by:

<u>Item</u>	<u>State, Local and County</u>	<u>LATC</u>
Non-remittance returns filed For the second and third Quarters of 1986	\$470,632	\$470,632

Petitioner's Contention

The partnership was dissolved on March 31, 1986 and petitioner, as partner, should not be held liable for debts incurred by REDACTED TEXT subsequent to this date.

Summary of Petition

This petitioner is one of three separate individuals determined to be liable for a sales tax deficiency incurred in the operation of a service station located at REDACTED TEXT, California.

The service station was operated under a seller’s permit issued on 10-1-85 to an individual, REDACTED TEXT, (hereafter REDACTED TEXT). Subsequent investigation disclosed that REDACTED TEXT had entered into a partnership agreement with this petitioner (REDACTED TEXT), REDACTED TEXT, and REDACTED TEXT for the operation of the service station. Under the of the partnership agreement effective September 19, 1985, REDACTED TEXT was to serve as managing partner and operate the station. Each of the above-named individuals were described as non-managing partners whose principal obligation was to invest and pay in capital in the amount of \$40,000 each.

A dual determination was issued on the basis that each partner was liable for no remittance returns filed for the second and third quarter of 1986. A separate dual determination was issued against each partner for a tax deficiency summarized on a field billing order for the period 10-1-86 to 11-7-86.

The petitioner and each of them do not dispute that the business was actually operated as a partnership. It is submitted, however, that the partnership was actually dissolved in March of 1986 and that the individual partners are not liable for any tax deficiency received after this date.

The following chronology of dates and events has been offered by petitioner’s attorney in support of the March 1986 claimed dissolution:

<u>Date</u>	<u>Event</u>
mid-1985	REDACTED TEXT solicits REDACTED TEXT, REDACTED TEXT, and REDACTED TEXT (“Petitioners”) to purchase a gasoline business in a partnership
Sept-85	REDACTED TEXT and Petitioners enter into a Partnership Agreement – Exhibit 1.
Oct-85	REDACTED TEXT, individually, purchases the gas station – Exhibit 2. REDACTED TEXT, individually, applies for Seller’s Permit – Exhibit 3. REDACTED TEXT, individually, applies for federal employer identification number – Exhibit 4. REDACTED TEXT, individually, applies for state unemployment insurance – Exhibit 5. REDACTED TEXT, individually, files a Fictitious Business Name Statement – Exhibit 6.

REDACTED TEXT retains accounting firm and represents that he owns the gas station individually – Exhibit 7.

Oct-85 to
Dec-85 REDACTED TEXT operates the gas station. He advises all creditors that he owns the station individually – Exhibit 8.

REDACTED TEXT files all state and federal tax returns as an individual and not as a partnership.

March-86 Concerned with REDACTED TEXT's conduct and mounting losses, Petitioners meet with REDACTED TEXT to discuss closing down business or selling it. REDACTED TEXT refuses to close down, but agrees to buy out the partners' interest effective as of March 31, 1986 – Exhibit 9.

May-86 REDACTED TEXT repudiates his agreement to purchase and refuses to shut down the station – Exhibit 10.

June-86 Petitioners retain legal counsel to oppose REDACTED TEXT and later file suit to rescind the partnership – Exhibits 11 and 12.

Dec-86 REDACTED TEXT informs Board of Equalization, for the first time, that the business was owned by a partnership – Exhibit 13.

It is conceded that dissolution was not effected under the terms of the partnership agreement. Notwithstanding this, it is argued that the parties actually withdrew after receipt of the operating statement for the month of February 1986. In support of this the petitioners' attorney has submitted a written chronology prepared by REDACTED TEXT of the events leading up to the ultimate withdrawal of the partners (Copy in file). Also submitted was a copy of a letter from petitioners' attorney to REDACTED TEXT dated July 18, 1986, wherein the partners specifically objected to the continued operation of the business.

Petitioners' representative also presented a host of other documents and applications such as the application for a seller's permit. All of which were calculated to show and do evidence that REDACTED TEXT intended to conceal the existence of the partnership from the general public and the business community.

Petitioners' attorney also advised REDACTED TEXT failed to keep adequate books and records and violated many other material provisions of the partnership agreement. He indicated that each member of the partnership orally objected to him continuing the operation of the business in April of 1986, while negotiating a sale of the partnership interest of REDACTED TEXT and REDACTED TEXT to REDACTED TEXT and REDACTED TEXT. Although a tentative agreement to sell the interests of these two partners was reached on April 29, 1986 (see summary of REDACTED TEXT, copy in file) this agreement was actually repudiated by REDACTED TEXT by letter dated May 3, 1986, (copy also in file). In this letter REDACTED TEXT indicated that the business was being placed up for sale with a broker. A purchaser was located but the deal was not consummated because the REDACTED TEXT would not approve an assignment of the service station lease. The business ceased operation on or about November 7, 1986.

On February 17, 1987, the partners jointly filed an action against REDACTED TEXT for recession and restitution, money loaned and received etc. An answer has been filed but the matter has not proceeded to trial.

REDACTED TEXT did not file a petition for redetermination.

Analysis and Conclusions

The general rule is that a partner (REDACTED TEXT in this case) has no authority to bind his co-partners to new obligations after dissolution of the partnership (see Glassel v. Prentiss, 175 Cal.App.2d 599). An exception is recognized, however, with respect to any act appropriate to wind up partnership affairs (Cal. Corp. Code 15033, 15035(a)). We are therefore required to determine if a dissolution occurred and if so whether any continued operation was in furtherance of winding up the partnership affairs.

California Corporation Code 15029 defines a dissolution of a partnership as “the change in the relationship of the partners caused by any partners ceasing to be associated in the “carrying on as distinguished from the winding up of the business.” It is clear that none of the partners effected a dissolution under the terms of paragraph 18 of the parties agreement because this required that any partner could only withdraw at the end of the fiscal year by giving ninety (90) days written notice of his intention to do so. This was not done. On the other hand, a dissolution may be effected in contravention of the agreement “by the express will of any partner at any time.” (Cal. Corp. Code 15031(2).)

Considering the chronology set forth in the memorandum to REDACTED TEXT dated May 3, 1986 prepared by the husband of REDACTED TEXT, we believe it clear that two of the partners, REDACTED TEXT and REDACTED TEXT, had clearly expressed a desire to discontinue the carrying on (as distinguished from winding up) of the partnership business by March 31, 1986. It does appear, however; that the partners were resigned to REDACTED TEXT’s continued operation of the business during the time a sale of their interests was being negotiated to REDACTED TEXT and REDACTED TEXT. It further appears, however, that the parties had not consented to the REDACTED TEXT’s continued operation of the business indefinitely. This is indicated by REDACTED TEXT’s letter of May 3, 1986, which insisted that REDACTED TEXT complete the previously agreed purchase of the partnership interests. There followed a series of telephone discussions, consultations with an attorney, and ultimately a written demand that REDACTED TEXT cease the operation of the business. It seems clear that continued operation of the business was not in the furtherance of the best interests of the partnership because large losses were being incurred each month. Nor was it required in order to wind up the affairs of the partnership. We therefore conclude that any operation conducted after May 3, 1986, were not on behalf of the partnership but on behalf of REDACTED TEXT individually. It follows that the liability of the individual partners extends to May 3, 1986, but not beyond.

Recommendation

It is recommended that the liability of the withdrawing partner be limited to the period 4-1-86 to 5-3-86. If figures are not available to make an adjustment on an actual basis, it should be prorated on the basis of the amount reported on the second quarter 1986 sales tax return. Adjustment is to be initiated by Petition Unit.

W. E. Burkett, Hearing Officer

2-8-88
Date