

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

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

This matter came on regularly for hearing in Van Nuys, California, on January 4, 1977, before W. E. Burkett, Hearing Officer.

Appearances

For the Petitioner:

For the Board: Mr. Aram Boyajian, Supervising Auditor

Protested Item
(Period 1-6-67 to 10-31-74)

Successorship billing for tax deficiency of _____ \$24,207.67

Contention of Petitioner

The firm is not the successor to the corporation, _____

Summary of Petition

This protest involves a petition for review of a staff determination that the petitioner was the business successor to _____ account No. _____, and therefore liable for the sales tax deficiency of this entity.

It appears from the information accumulated to this date that the two principal stockholders of the above-named corporation had business differences and made a decision to discontinue their business association. One individual, _____, allegedly obtained certain of the printing equipment, and set up a new business venture in an individual capacity. The other principal stockholder and his business associates secured the balance of the assets and used them in the business activities of a new corporation (petitioner).

Initially, an attempt was made by the parties to resolve their difference by a letter agreement for sale of certain of the assets (see photocopy at A-2 of the petition file). However, petitioner's representative advised that this proposal was not consummated. Thereafter, actions and counter actions were filed by the various individuals and the above-named corporation. We are advised

that none of these actions have been pursued to judgment. The predecessor corporation has been suspended for failure to file its franchise tax returns.

The new corporation continued in business at the same address utilizing a similar name and method of conducting business. The petitioner's representative would not take a position on the nature of the transfer of assets to the petitioner, except to argue that the transfer was not a sale.

Analysis and Conclusions

The available evidence does not support a finding that the petitioner was the successor liable for the tax deficiency of _____, under the provisions of Revenue and Taxation Code section 6811 and 6812 and Sales and Use Taxes Regulation 1702.

The provisions of sections 6811 and 6812 and regulation 1702 are limited to a transferee who is a purchaser of a stock of goods or business of the retailer, including a portion thereof. The information obtained to this date indicates that the major stockholders merely used "self-help" to obtain the assets and to utilize them in furtherance of their respective business ventures. A purchase requires that there be an agreed exchange for a valuable consideration (Revenue and Taxation Code section 6010(a)). In absence of a sale (and purchase) there is no sales price to withhold (see regulation 1702).

We observe, however, that a distribution of assets to a shareholder may be recovered by the corporation or by its receiver, liquidator or trustee in bankruptcy if, as appears here, the distribution was received without a court order and without adequate provision being made for the payment of the debts of the corporation (see California Corporation Code Section 5012).

A creditor, such as the State of California, may be appointed a receiver for an insolvent corporation if the claim has been reduced to judgment and legal collection remedies exhausted (Delaney Producing & Refining Co. v. Crystal Petroleum Products Co., 88 Cal.App.784). The reduction of the claim to judgment involves only a request and a filing in the manner prescribed by Revenue and Taxation Code Section 6736 and 6737. The files of the predecessor indicate that the board has already exhausted all of its remedies to collect the tax from the suspended corporation.

It also appears that the board has perfect liens on the assets of the corporation by the filing of certificates of delinquency pursuant to the provisions of Revenue and Taxation Code section 6757 and 6757.5. These liens would appear to attach to the assets in the hands of the petitioner since it has not shown that the assets were obtained by a purchase made for a valuable consideration without notice.

Recommendation

The successorship billing made against this petitioner should be held in abeyance until such time as the nature of the transfer to the petitioner is finally determined. This petitioner's file and the entire file of _____ Account No. _____, should be transferred to the office of the California Attorney General with a request to consider the appointment of a receiver to collect the corporate

assets held by this petitioner, and apply them to the corporations' tax debts or alternatively to foreclose the liens created on the subject property.

W. E. BURKETT, HEARING OFFICER

2-25-77
Date