

**CALIFORNIA STATE BOARD OF EQUALIZATION**  
**APPEALS DIVISION SUMMARY FOR BOARD HEARING**

In the Matter of the Administrative Protest )  
of Successor Liability and Claim for Refund )  
Under the Sales and Use Tax Law of: )  
SMOKER'S PARADISE, LLC ) Account Number: SR GHC 100-308641  
Taxpayer/Claimant ) Case ID's 295398, 378099  
San Leandro, Alameda County

Type of Business: Tobacco sales

Liability period: 10/01/96 – 12/31/03

<u>Item</u>	<u>Disputed Amount</u>
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Successor liability	\$5,769
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Successor Liability

As determined:	\$18,611.08
Adjustment - Appeals Division	- 9,367.00
Payments by predecessor	<u>- 3,475.45</u>
Balance, protested	<u>\$ 5,768.63</u>
Successor liability, adjusted	\$5,768.63
Payments	<u>- 5,407.58</u>
Balance Due	<u>\$ 361.05</u>

This matter was previously scheduled for Board hearing on November 17, 2009, but was rescheduled in order to be scheduled concurrently with several related cases.

**UNRESOLVED ISSUES**

**Issue:** Whether taxpayer is liable as a successor for the unpaid liabilities of Cigarettes Cheaper (SR JHF 99-793094). We conclude that taxpayer is liable.

Taxpayer purchased a Cigarettes Cheaper sub-location without withholding any amount from the purchase price for payment of sales and use tax owed by Cigarettes Cheaper and without obtaining a tax clearance certificate from the Board. The Sales and Use Tax Department (Department) found that taxpayer is liable as a successor for Cigarettes Cheaper's unpaid liabilities pursuant to a Notice of Determination for the period October 1, 1996, through September 30, 1999, and for partial-remittance prepayment forms and sales and use tax return filed by Cigarettes Cheaper for the fourth quarter 2003 (4Q03). The Department therefore issued a Notice of Successor Liability to taxpayer on October 29,

2004. Thereafter, Cigarettes Cheaper paid the entire amount due for the 4Q03 of \$3,475.45 (\$2,381.87 tax, \$724.46 interest, and \$369.12 penalty), and the successor liability has been adjusted accordingly.

As relevant here, the liability assessed against the predecessor was based on taxable gross receipts in the form of third-party cigarette rebates paid to the predecessor in connection with its taxable retail sales of cigarettes. The Department recalculated the predecessor's liability to remove the tax assessed on cigarette rebates paid to the predecessor for sales it made prior to January 1, 1999, as ordered by the Board on March 18, 2008. The effect on taxpayer's successor liability was a reduction of \$9,367.00.

Taxpayer filed an untimely appeal of the Notice of Successor Liability, which has been accepted as an administrative protest. Taxpayer has also filed a timely claim for refund of \$3,750.00 that it paid on December 9, 2005.<sup>1</sup> Taxpayer contends that the Department's determination against Cigarettes Cheaper is not yet final, and the Board should not pursue taxpayer until that matter is resolved. However, the statute imposing the duty on a purchaser of a business to withhold sufficient of the purchase price to pay sales and use tax debts is not conditioned on the liability having been reduced to a final liability. Rather, the liability accrues under Revenue and Taxation Code section 6812 upon a successor's failure to comply with the requirements of Revenue and Taxation Code section 6811 (withhold sufficient of the purchase price to pay any tax debts, or obtain a tax clearance). In any event, this contention is moot since the primary liability of Cigarettes Cheaper is now final.

Taxpayer contends further that, when it purchased the sub-location, it was unaware of the outstanding tax liability, consistent with the seller's representations and its understanding was that the seller had agreed to pay any taxes that had accrued prior to the date of the sale. Taxpayer also contends it is unfair to make it pay Cigarettes Cheaper's tax liabilities. The fact that taxpayer may have been unaware of Cigarettes Cheaper's tax liability is not a basis for relief from the liability. Section 6811 imposes an affirmative duty on a purchaser of a business or stock of goods to either

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<sup>1</sup> Taxpayer made payments totaling \$5,407.58 during the period June 8, 2005, through September 27, 2007. Since more than three years has elapsed from the due date of the liability and the Notice of Successor Liability went final more than six months before taxpayer filed a claim for refund (or made any payments for which a claim could have been filed), the relevant limitation period within which to file a claim for refund in connection with any of the payments is six months from the date of payment. (Rev. & Tax. Code, § 6902, subd. (a).) Taxpayer has not filed timely claims for refund for any of its payments other than the payment of \$3,750.00, and the time for doing so has passed.

withhold an amount from the purchase price sufficient to cover the tax liability of the seller or to request a certificate from the Board stating that the seller of the business has no outstanding liabilities. Taxpayer did neither.

Nor does taxpayer's argument that it is unfair to make it pay Cigarettes Cheaper's tax-related liabilities provide any basis for relief. As noted above, the law establishes procedures a purchaser of a business is required to follow in order to avoid being held liable as a successor. Taxpayer did not comply with those requirements, and it is thus liable as a successor for the outstanding liabilities of Cigarettes Cheaper. Similarly, any purported agreement by Cigarettes Cheaper to pay any taxes and related interest that had accrued before the date of the sale of the business is irrelevant. Indeed, there is no dispute whatsoever that Cigarettes Cheaper incurred the liability in dispute, and is primarily liable for it. It could not, by agreement, avoid such liability vis-à-vis the Board, nor would any agreement to retain that liability vis-à-vis its purchaser be relevant to the liability of Cigarettes Cheaper to the Board. The existence of such an agreement would be similarly irrelevant to taxpayer's dual liability for the subject debt, which taxpayer incurred under section 6812 by failing to comply with the statutory requirements of sections 6811.

#### **AMNESTY**

The amnesty interest penalty is not applicable in this case because taxpayer filed an application for amnesty and entered into a qualifying installment payment plan.

#### **OTHER DEVELOPMENTS**

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III