

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:)
DOUGLAS BRENT DUNBAR & ZAID RAHMANI,) Account Number: SR CH 100-361961
dba Cigarettes "R" Cheaper) Case ID's 304043 & 378109
Taxpayer/Claimant) Alameda, Alameda County

Type of Business: Mini mart
Liability period: 10/01/96 – 01/31/04

| <u>Item</u> | <u>Disputed Amount</u> |
|-------------------------------|----------------------------|
| Successor liability | \$8,866 |
| | <u>Successor Liability</u> |
| As determined: | \$9232.59 |
| Adjustment – Appeals Division | - 366.44 |
| Balance, protested | <u>\$8,866.15</u> |
| Successor liability, adjusted | \$8,866.15 |
| Payments | <u>4,504.65</u> |
| Balance Due | <u>\$4,361.50</u> |

UNRESOLVED ISSUE

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 liabilities associated with partial-remittance return filed for the first quarter 2004, and issued a Notice of Successor Liability to taxpayer on January 11, 2005. At the time that determination was issued, the predecessor had paid all tax due, and only interest and penalty remained.

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. However, in making those adjustments, the Department identified errors in the Notice of Successor Liability that, even after making the adjustment, results in an increase to petitioner's liability. The Department has not asserted that increase.

Taxpayer filed an untimely appeal of the Notice of Successor Liability, which has been accepted as an administrative protest. Taxpayer also filed a timely claim for refund of \$350.00 that it paid on August 25, 2005.¹ 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

¹ Taxpayer has made payments totaling \$4,504.65 during the period April 6, 2005, through December 9, 2005. Since more than three years has elapsed from the due date of the liability, the relevant limitation period within which to file a claim for refund in connection with any of the remaining payments is six months from the date the liability became final or six months from the date of payment. (Rev. & Tax. Code, § 6902, subd. (a).) The liability became final on February 10, 2005, and the last payment was made December 29, 2006. Thus, the applicable limitation periods for filing a claim for refund have expired for any payment other than the \$350 payment made in August 2005 for which the timely claim for refund was submitted.

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 and penalty 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. In addition, the amnesty interest penalty applies only to interest that accrued on the unpaid tax balance as of March 31, 2005. In this case, the successor liability did not include an unpaid tax balance as of March 31, 2005, and here all the tax was paid prior to March 31, 2005.

RESOLVED ISSUE

The D&R recommends relief of the penalty for late payment of \$366.44 because taxpayer has established that there was no common ownership or relationship between taxpayer and the predecessor.

OTHER DEVELOPMENTS

None.

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