

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Administrative Protest of) the Successor Liability and Claim for Refund) Under the Sales and Use Tax Law of:)) KENNETH RICHARD MCLEOD, dba) McCloud's Pet Emporium)) Taxpayer)	Account Number: SR KH 100-333627 Case ID's 435025, 504922)) Sonora, Tuolumne County
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Type of Business: Pet store
 Liability period: 01/01/95 – 06/30/00

<u>Item</u>	<u>Disputed Amount</u>	<u>Tax</u>	<u>Penalty</u>
Successor liability	\$121,049 (tax)		
Claim for refund	\$ 16,466 ¹		
As determined:		\$121,048.88	\$24,642.55
Adjustment - Appeals Division		<u>00.00</u>	<u>- 24,642.55</u>
Adjusted determination, protested		<u>\$121,048.88</u>	<u>00.00</u>
Tax		\$121,048.88	
Interest through 3/31/10		<u>157,432.79</u>	
Total tax and interest		\$278,481.67	
Payments		<u>21,165.81</u>	
Balance Due		<u>\$257,315.86</u>	
Monthly interest beginning 4/1/10		<u>\$ 582.67</u>	

UNRESOLVED ISSUE

Issue: Whether taxpayer is liable for the unpaid tax-related liabilities of the predecessor, Kenneth Roy McLeod. We find that taxpayer is liable as a successor.

¹ Taxpayer filed a claim for refund "of all monies paid" on August 3, 2009. As of the date of the claim for refund, taxpayer had made payments totaling \$16,465.81. However, the claim is not timely for the entire amount of payments made. Since the liability was final December 28, 2006, the generally applicable statute of limitations provides that a claim for refund must be filed within six months from the date of payment in order to be timely. (Rev. & Tax. Code § 6902, subd (a)(1).) Here, some payments were collected by levy, and as to such payments, the limitations period for filing a claim for refund is three years from the date of overpayment. (Rev. & Tax. Code § 6902.3.) Thus, the claim for refund here is timely for payments of \$8,381.24, including \$2,084.18 paid within the six months before the date of the claim and two payments collected by means of levy in 2007 totaling \$6,297.06.

Taxpayer purchased a pet store known as McCloud's Pet Emporium from his father, Kenneth Roy McLeod (SR KH 21-653650), who had begun operating the store in 1973. In May 1995, predecessor and his spouse filed for Chapter 11 bankruptcy, which was converted to a Chapter 7 bankruptcy in June 1996. Pursuant to the Bankruptcy Court's order dated August 1, 1996, the bankruptcy trustee sold the debtors' personal property assets, including this pet store, back to the debtors. The predecessor continued to operate the pet store through most of 2003. According to a December 5, 2003 Bill of Sale signed by the predecessor and taxpayer, the parties agreed that predecessor sold the pet store to taxpayer in consideration for taxpayer's payments totaling \$25,000 and "assumption of all current and long term liabilities of McCLOUD'S PET EMPORIUM." The Bill of Sale further stated the parties intended all assets of the business to have been transferred to taxpayer as of January 1, 2002, and the sale would be deemed consummated as of January 1, 2004. In January 2004, taxpayer began operating the business under seller's permit SR KH 100-333627. Taxpayer did not request or obtain a receipt from the Board indicating that predecessor had paid all his tax-related liabilities, nor did taxpayer withhold from the purchase price an amount sufficient to cover any outstanding tax liabilities. Accordingly, the Sales and Use Tax Department (Department) concluded that taxpayer is liable as a successor for the debts incurred by Kenneth Roy McLeod.

Taxpayer asserts that he and his two sisters purchased the store from the bankruptcy trustee in 1996. Taxpayer also contends the sale of the pet store did not include any transfer of the predecessor's tax liabilities, that the Bill of Sale does not provide for such a transfer of liabilities, and that he would not have purchased the store if the sale had included a transfer of such liabilities.

Revenue and Taxation Code section 6811 imposes an affirmative duty on a purchaser of a business or stock of goods to withhold an amount from the purchase price sufficient to cover the tax liability of the seller unless a certificate is obtained from the Board stating that the seller of the business has no outstanding liabilities. A failure to comply with this requirement results in the purchaser's becoming personally liable for the payment of the amount he or she was required to withhold, to the extent of the purchase price. (Rev. & Tax. Code, § 6812, subd. (a).) However, the requirement to withhold a sufficient amount to cover the seller's tax liability does not arise in connection with a sale by a trustee in bankruptcy. (Cal. Code Regs., tit. 18, § 1702, subd. (a).)

In support of his contention that he and his sisters purchased the store from the bankruptcy trustee in 1996, taxpayer provided letters from himself, each of his sisters, and his father (the predecessor) stating that taxpayer and his sisters supplied the funds for the 1996 purchase of the pet store from the bankruptcy trustee. However, regardless of who provided the money for the purchase, the Bankruptcy Court documents indicate the bankruptcy trustee sold the pet store to the predecessor, not to taxpayer. Further, the predecessor reported income from the business as a sole proprietor on his 2001, 2002, and 2003 federal income tax returns. Also, he executed Supplemental Lease Agreements for rental of the store premises through December 31, 2003, which did not identify anyone other than predecessor as the tenant. Moreover, predecessor continued to operate the store under his seller's permit until December 31, 2003. All of this evidence is consistent with the Bankruptcy Court documents that show the bankruptcy trustee sold the pet store to predecessor, as is the fact that the December 5, 2003 Bill of Sale documents a sale from the predecessor to taxpayer as of January 1, 2004. Accordingly, we find that the evidence does not support taxpayer's contention that he purchased the pet store from the bankruptcy trustee in 1996.

Regarding taxpayer's argument that a transfer of tax liabilities was not part of the sale of the business, taxpayer's liability at issue here is not based on a provision in the purchase agreement, but rather is imposed by statute. (Rev. & Tax. Code § 6812, subd. (a).) To the extent that there was a provision in the agreement regarding the tax liability, that provision would establish the rights and liabilities of the seller and the purchaser vis-à-vis themselves, and would not supersede the liability imposed by statute at issue here. Furthermore, the Bill of Sale describes the consideration paid by taxpayer for the business as including "assumption of all current and long term liabilities" of McCloud's Pet Emporium, and that wording does appear to include the tax liabilities.

Although not specifically addressed by taxpayer, we note that taxpayer's successor liability is not limited to the \$25,000 cash payment. Taxpayer also assumed liabilities of the predecessor, and that assumption of liabilities is also part of the purchase price of the business.

RESOLVED ISSUE

The penalties originally assessed against the predecessor for late payment of returns and late prepayments have been deleted from the successor liability. The D&R concludes that there was no

common ownership between the successor and the predecessor, and taxpayer was not a responsible person in the predecessor entity. Accordingly, the D&R recommends relief of the penalties originally assessed against taxpayer.

OTHER DEVELOPMENTS

None.

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