STATE BOARD OF EQUALIZATION
SALES AND USE TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Reconsideration of Successor Liability Under the Sales and Use Tax Law of:	)	
GLADYS LILLIAN MARTINES, dba Gladys General Store	)	Account Number: SR KH 100-769449 Case ID 461496
Petitioner	)	Penn Valley, Nevada County

Type of Business:	Grocery store
Liability Period:	10/1/05 – 6/20/06
Item	Disputed Amount
Successor liability	$7,775

	Tax	Penalties
As determined, protested	$6,610.36	$1,164.30
Proposed tax redetermination	$6,610.36	
Interest through 9/30/10	2,803.03	
Late payment penalty (10/1/05 – 3/31/06)	563.30	
Failure-to-file penalty (4/1/06 – 6/20/06)	300.50	
Finality penalty (4/1/06 – 6/20/06)	300.50	
Total tax, interest, and penalties	$10,577.69	
Payment	-446.00	
Balance Due	$10,131.69	
Monthly interest beginning 10/1/10	$35.96	

Petitioner responded to the Notice of Conference that she would attend the appeals conference. However, petitioner failed to appear at the conference, which was held as scheduled. In a letter dated October 1, 2009, we offered petitioner an opportunity to present her arguments in writing, along with any supporting evidence. By letter dated November 16, 2009, petitioner submitted documentation which we provided to the Sales and Use Tax Department (Department) to review. The Department responded by memorandum dated January 5, 2010.

This matter was scheduled for Board hearing on August 25, 2010, but was postponed because petitioner's representative requested additional time to prepare for the oral hearing and to file an opening brief.

UNRESOLVED ISSUES

Issue 1: Whether petitioner is liable as a successor for the unpaid liabilities of Milkman Farms Company (Milkman) (SR KH 100-446824) for the period October 1, 2005, to June 20, 2006. We conclude petitioner is liable.

Milkman operated a small grocery store, known as Palermo's Market, from September 1, 2004, through June 20, 2006. At close out, Milkman had an outstanding liability consisting of tax and penalties based on: (1) non-remittance sales and use tax returns filed for the fourth quarter of 2005 (4Q05) and 1Q06, and (2) a Notice of Determination (NOD) issued to Milkman on March 20, 2007, for the period April 1, 2006, through June 20, 2006, after Milkman failed to file a return for this period (the NOD became final on April 19, 2007). Petitioner owns the real property on which Milkman's grocery store was located, including the surrounding strip mall with several other businesses. When Milkman closed its business on or about June 20, 2006, it began removing the inventory, fixtures, and equipment from the business premises. On June 21, 2006, petitioner and Milkman's president entered into an agreement whereby Milkman agreed to stop removing any additional property or furnishings from the business and turn over all the keys to the premises, and, in exchange, petitioner forgave the past-due rents. On June 22, 2006, petitioner applied for a seller's permit and reopened the grocery store on June 23, 2006, under the business name Gladys General Store. The Department concluded petitioner purchased a business or stock of goods from Milkman and is liable as its successor under Revenue and Taxation Code section 6812 because petitioner failed to withhold from the purchase price an amount sufficient to cover Milkman's unpaid liabilities to the Board or obtain a tax clearance.

Petitioner contends she is not liable as a successor because she did not take over a going business. Petitioner indicates that Milkman's business had been failing for months and that its rent owed to petitioner was past due. Petitioner also indicates that Milkman was in default on all of its equipment leases, and the equipment lessors were in the process of repossessing their equipment. Petitioner relies on *Knudsen Dairy Products Co. v. State Bd. Of Equalization* (*Knudsen)* (1970) 12 Cal.App.3d 47, 53, to support her argument that a purchaser must step into a going business and immediately take over its operations in order to be considered a successor. Petitioner also argues she did not purchase Milkman's business, alleging that the debt forgiveness was in consideration for

Milkman's immediate abandonment of the premises. In that regard, petitioner asserts the agreement did not contain any language about her purchasing Milkman's business. Alternatively, petitioner asserts that Milkman led her to believe that all taxes were paid and contends that Milkman's president should be held liable for Milkman's unpaid liabilities. Thus, petitioner asserts she should not be held liable for any of Milkman's unpaid tax liability.

We find that petitioner purchased Milkman's business by forgiving Milkman's debts to petitioner and acquiring the property and furnishings that remained in the business location. (See Business Taxes Law Guide (BTLG) annotation 535.0012 (2/28/1985).)[1] Petitioner obtained a seller's permit the day after the date of the agreement, June 21, 2006, and started, on June 23, 2006, to engage in the same type of business Milkman had operated. Also, petitioner benefitted from the use of the fixtures and equipment previously held by Milkman, regardless of whether the sale of that property was part of the agreement (which we find was the case). Thus, we find petitioner was a successor to Milkman within the meaning of Revenue and Taxation Code section 6811, and was thus required to withhold an amount from the purchase price sufficient to cover the tax liability since Milkman did not produce a receipt or certificate (tax clearance) from the Board stating that no such liability existed. Since she did neither, petitioner became liable for seller's unpaid tax-related liabilities. (Rev. & Tax. Code, § 6812.)

We do not find persuasive petitioner's argument that she cannot be held liable as a successor because Milkman's business was not a going concern. Nothing in the Revenue and Taxation Code or in *Knudsen*, on which petitioner relies, requires a business to have been ongoing or operational at the time of the purchase for successor liability to attach. Moreover, while Milkman may not have been operating a healthy business, as evidenced by falling sales, low inventory, and a declining customer base, it was a going concern. There is no dispute that Milkman remained in business until on or about June 20, 2006, three days prior to the date petitioner opened her grocery store at the same location.

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[1] Annotations do not have the force or effect of law, but are intended to provide guidance regarding the interpretation of the Sales and Use Tax Law with respect to specific factual situations. (Cal. Code Regs., tit. 18, § 5700, subds. (a)(1), (c)(2).)

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With respect to petitioner's allegation that Milkman's president told her it did not have an outstanding tax liability, section 6811 requires the successor to withhold sufficient of the purchase price to pay the predecessor's liabilities unless the seller produces a receipt showing payment of all amounts due or a clearance certificate saying no amount is due. The statute makes no exception for the successor's reliance on a statement of non-liability by the predecessor. Finally, with respect to petitioner's argument that Milkman's president should be held personally liable for any taxes due as a result of Milkman's operation of the grocery store, we note more than one person may be held personally liable for a corporation's unpaid liabilities, whether as a successor under section 6812 or as a responsible person under section 6829, so long as the requirements for imposing such liability on each person are satisfied.[2] In this case, the Board did consider the possibility that Milkman's president might be personally liable as a responsible person, but the Department's investigation did not yield enough evidence to prove all elements required to issue a determination section 6829, and the statute of limitations for issuing a determination has now expired. In any event, without regard to Milkman's president's liability, we conclude that petitioner is a successor who was required by section 6811 to withhold from the purchase price for payment of the tax liability of the predecessor, and is liable under section 6812 for having failed to do so.

Issue 2: Whether petitioner has established reasonable cause to relieve the penalties incurred by Milkman. We find no basis to recommend relief.

In a post conference letter, we explained to petitioner that a successor may be relieved of penalties included in the Notice of Successor Liability by establishing the absence of a relationship between the successor and the predecessor (such that there was no common ownership, and the successor was not a responsible person in the predecessor entity). Since a successor seeking relief of penalties passed through from the predecessor must file a written statement signed under penalty of perjury stating the facts upon which he or she bases the claim for relief, in our October 1, 2009 letter, we also provided petitioner a "Request for Relief from Penalty" form she could use for that purpose. In the letter submitted by petitioner on November 16, 2009 (mentioned above), she also requested that

[2] The liability will be collected only once, without regard to how many persons are held liable.

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any penalties should be deleted. However, that letter was not signed under penalty of perjury nor did petitioner explain *why* the penalties should be deleted. Thus, petitioner has not submitted the requisite declaration signed under penalty of perjury and accordingly, we have no basis upon which to recommend relief.

OTHER DEVELOPMENTS

None.

Summary prepared by Rey Obligacion, Retired Annuitant

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