

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

In the Matter of the Petition for Reconsideration )  
Of Successor Liability and Claim for Refund )  
Under the Sales and Use Tax Law of: )  
MONTANA AVE RESTAURANT, INC., dba ) Account Number SR AS 101-189279  
17<sup>th</sup> Street Café ) Case ID's 495272, 527587  
Petitioner ) Santa Monica, Los Angeles County

Type of Business: Restaurant  
Audit period: 04/01/05 – 01/11/09

<u>Item</u>	<u>Disputed Amount</u>		
Successor liability	\$120,543		
Claimed overpayment	\$ 2,925		
		<u>Tax</u>	<u>Penalty</u>
As determined		\$265,961.14	\$133,090.68
Pre-D&R adjustment		- 145,418.27	- 133,090.68
Proposed redetermination, protested		\$120,542.87 <sup>1</sup>	<u>\$ 00.00</u>
Payments		- 2,925.00	
Balance Due		<u>\$117,617.87</u>	

**UNRESOLVED ISSUES**

**Issue 1:** Whether petitioner is liable as a successor for the unpaid liabilities of 17<sup>th</sup> Street Café, Inc. We conclude petitioner is liable.

In March 1989, 17<sup>th</sup> Street Café, Inc. (17<sup>th</sup> Street) was incorporated, and the corporation filed an application for a seller's permit in August 1989. That application was signed by Jack Srebnik and Jane Srebnik, who owned 98 percent of the stock of 17<sup>th</sup> Street. In November 2003, the Srebniks sold 100 percent of their interest in the corporation to three employees of the restaurant for \$1,000,000. The Srebniks and buyers did not open escrow for this sale. Instead, according to Mr. Srebnik, upon the sale, the Srebniks merely transferred to buyers the business's bank accounts, liquor license, and lease

<sup>1</sup> Since the purchase price of the business was \$120,542.87, that is the maximum amount for which petitioner is held liable as a successor. Accordingly, no interest will accrue on this amount.

1 for the restaurant premises. The Srebniks retained physical possession of the 17<sup>th</sup> Street stock  
2 certificates as collateral, and the promissory note executed by the buyers stated that the Srebniks could  
3 foreclose and either ‘take back’ or force a sale of the restaurant in the event buyers failed to timely  
4 remit the required payments.

5 Buyers made regular payments to the Srebniks for several years, but they failed to make any  
6 payments after September 15, 2008. In October 2008, the Srebniks, through counsel, demanded that  
7 buyers cure the default or the Srebniks would commence legal proceedings to either take back or force  
8 a sale of the restaurant. Since they received no reply, the Srebniks, on or about January 7, 2009,  
9 foreclosed on the 17<sup>th</sup> Street shares they held as collateral for the promissory note and regained  
10 possession of the restaurant. In a letter dated January 15, 2009, buyers, through counsel, indicated that  
11 they voluntarily returned the restaurant.

12 On January 9, 2009, petitioner was incorporated in California, and on January 12, 2009,  
13 petitioner entered into an agreement with 17<sup>th</sup> Street, through which petitioner purchased the assets of  
14 17<sup>th</sup> Street for total consideration of \$120,542.87, representing the assumption of debts to third parties.  
15 That agreement was between 17<sup>th</sup> Street and petitioner, and Mr. Srebnik was the sole signatory of the  
16 agreement (signing as the president of both corporations). Petitioner then filed an application for a  
17 seller’s permit, signed by Mr. Srebnik, on January 28, 2009. In a letter dated February 25, 2009, more  
18 than a month after the date of the purchase agreement related to the transfer of ownership of the  
19 business, petitioner’s counsel requested a tax clearance certificate.

20 The Sales and Use Tax Department (Department) found petitioner liable as a successor for the  
21 tax liabilities incurred by 17<sup>th</sup> Street, and it issued a Notice of Determination on June 18, 2009, for  
22 \$265,961.14 tax, \$133,090.68 penalties, and accrued interest. The Department subsequently reduced  
23 the amount of the determination to \$120,542.87, since a successor is only liable for the tax liabilities of  
24 the predecessor to the extent of the purchase price. (Rev. & Tax. Code, §6812, subd. (a).)

25 Petitioner contends that it is not liable as a successor for the tax liabilities of 17<sup>th</sup> Street because  
26 the Srebniks proceeded by way of non-judicial foreclosure on their security interest in the stock of 17<sup>th</sup>  
27 Street pursuant to the terms of the promissory note executed by the buyers. Petitioner states that the  
28 Srebniks did not purchase 17<sup>th</sup> Street for consideration, but merely foreclosed on the security interest

1 they held in the stock, and asserts that a foreclosing entity (here, the Srebniks) is not required to  
2 withhold a portion of the purchase price to cover the tax liability of the predecessor. At the appeals  
3 conference, Mr. Srebnik stated that no other consideration was paid to the original buyers upon  
4 surrender of the restaurant, and the buyers merely returned the keys to the premises.

5 It is undisputed that petitioner purchased a business from 17<sup>th</sup> Street, and the Asset Sale and  
6 Purchase Agreement states that petitioner purchased the tangible and intangible assets of 17<sup>th</sup> Street by  
7 assuming liability for 17<sup>th</sup> Street's debts totaling \$120,542.87. Petitioner acknowledges that it did not  
8 request a receipt from 17<sup>th</sup> Street showing no amounts due to the Board or obtain a tax clearance  
9 certificate from the Board prior to purchasing the business, and that it did not withhold from the  
10 purchase price an amount sufficient to cover 17<sup>th</sup> Street's outstanding tax liabilities. Accordingly, we  
11 find petitioner is liable, as a successor, for 17<sup>th</sup> Street's unpaid tax liabilities to the extent of the  
12 consideration provided, that is, the \$120,542.87 assumption of debt.

13 Petitioner's argument that it is not liable as a successor because it merely foreclosed on a  
14 security interest is not persuasive because petitioner (Montana Ave Restaurant, Inc.) did not obtain the  
15 business through a foreclosure. The only foreclosure that occurred was between the Srebniks and  
16 buyers, which is a wholly different transaction from the purchase of the business from 17<sup>th</sup> Street by  
17 petitioner. In that foreclosure, the Srebniks regained ownership of the stock of 17<sup>th</sup> Street; the  
18 transaction was not a sale of the restaurant business itself. After the Srebniks regained control of the  
19 business, they sold the business to petitioner, which is the transaction at issue here.

20 **Issue 2:** Whether the claim for refund should be granted. We find the claim for refund should  
21 be denied.

22 In March 2009, petitioner sold the business to Beverly Bagels, Inc. (SR AS 100-970090).<sup>2</sup> At  
23 that time, the Department conducted an audit of the period January 12, 2009, through March 17, 2009,  
24 and it found unreported taxable sales of \$146,698, as well as a sale of fixtures and equipment of

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26 <sup>2</sup> The Department has issued a Notice of Successor Liability for \$120,542.87 to Beverly Bagels, and that taxpayer has filed  
27 a timely petition for redetermination. Although the D&R indicates that the two appeals are linked for purposes of any  
28 Board hearing, Beverly Bagels has filed a settlement proposal, which is currently under consideration by the Settlement  
Division. If petitioner were to prevail in this matter, the successor liability assessed against Beverly Bagels would also be  
negated. Further, if a settlement is negotiated with Beverly Bagels, any amount paid by that taxpayer would then be  
applied to petitioner's liability

1 \$30,000. Petitioner paid the entire amount of the determination issued pursuant to that audit via an  
2 escrow check. The escrow holder responsible for this transaction sent a second escrow check of  
3 \$2,925, which represented the tax due on petitioner’s sales of fixtures and equipment. Since that  
4 amount had also been included in the audit, which had been paid in full, the Department applied the  
5 \$2,925 to the successor liability at issue here.

6 Petitioner claims it is entitled to a refund of the \$2,925 because it represents a duplicate  
7 payment of the tax due on the sale of fixtures and equipment. In its claim for refund, petitioner  
8 reiterates its argument that it is not liable as a successor for the amounts due from 17<sup>th</sup> Street.

9 There is no dispute that the \$2,925 in question was intended as a payment of tax on the sale of  
10 fixtures and equipment and that the tax related to that sale had been included in the amount determined  
11 by audit, which petitioner had paid in full. However, since petitioner still had an outstanding liability  
12 when the \$2,925 was received, it was appropriate for the Department to apply the “duplicate” payment  
13 of tax on the sale of fixtures and equipment to the successor liability at issue. Since we recommend no  
14 adjustment to the successor liability, and the amount paid does not exceed the amount due, we  
15 recommend that the claim for refund be denied.

16 **OTHER MATTERS**

17 None.

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