

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:)
INTERNET SUPPORT AND SERVICES CORP.,) Account Number: SR KHO 100-892537
dba Central Valley Retail and Security Solutions) Case ID 426155
Petitioner)
Fresno, Fresno County

Type of Business: Surveillance systems and cash registers

Liability period: 04/01/06 – 08/15/07

<u>Item</u>	<u>Disputed Amount</u>
Successor liability	\$17,518 ¹

	<u>Tax</u>	<u>Penalty</u>
As determined:	\$20,488.96	\$3,543.60
Adjustment - Appeals Division	<u>00.00</u>	<u>- 3,543.60</u>
Proposed redetermination	\$20,488.96	<u>\$ 00.00</u>
Less payments made by predecessor	<u>2,970.70</u>	
Balance, protested	<u>\$17,518.26</u>	
Proposed tax redetermination	\$20,488.96	
Interest through 1/31/10	<u>5,555.82</u>	
Total tax and interest	\$26,044.78	
Payments by predecessor	<u>2,970.70</u>	
Balance Due	<u>\$23,074.08</u>	
Monthly interest beginning 2/1/10	<u>\$ 102.19</u>	

This matter was previously scheduled for Board hearing on December 15, 2009, but was postponed at petitioner's request because of a scheduling conflict.

UNRESOLVED ISSUE

Issue: Whether petitioner is liable as a successor for the unpaid liabilities of Central Valley Business Systems, Inc. We conclude that it is.

¹ This amount represents the tax determined, net of the payments by the predecessor. It differs from the amount of tax stated in the D&R footnote (\$17,538.90) because the predecessor made a payment of \$20.64 after the date of the D&R.

1 Petitioner's seller's permit was issued with a start date of April 9, 2007. On August 7, 2007,
2 petitioner entered into an "Asset Purchase Agreement" (agreement) with Mr. Greg Chinn, the owner of
3 Central Valley Business Systems, Inc. (CVBS) (SR KHO 22-729712), for the purchase of certain
4 tangible and intangible business assets for a total selling price of \$40,000, with a closing date of
5 August 15, 2007. According to the agreement, petitioner would not assume any of the seller's
6 liabilities prior to the closing date, or obtain any right to CVBS's accounts receivable for six months
7 following the closing date. The agreement notes the existence of a federal tax lien against the assets of
8 CVBS for which Mr. Chinn was to assume personal responsibility, and which was to be paid out of the
9 purchase price at closing. One provision of the agreement indicates that the lien did not exceed
10 \$20,000, and another states that, at closing, petitioner was to pay \$15,000 to CVBS, but payable first to
11 the IRS, with any remainder to CVBS, and CVBS was to deliver to petitioner all company assets, keys,
12 website and trademark information, CVBS contractual documents, and all other items related to the
13 acquisition of CVBS's assets. The agreement provides that petitioner's obligation to purchase the
14 assets was subject to the fulfillment of certain conditions to petitioner's satisfaction. The agreement
15 provide that it was the full agreement between the parties, and that it could be amended only with the
16 written consent of the affected party.

17 On August 17, 2007, Ms. Alina Adams, secretary of petitioner, requested that the Sales and Use
18 Tax Department (Department) change the business and mailing address of petitioner and change
19 petitioner's dba to Central Valley Business Services. On September 6, 2007, the Department received
20 a notice of close-out for the seller's permit of CVBS, which also notified the Board of the sale of
21 CVBS to petitioner on August 15, 2007, for \$40,000. On October 2, 2007, Ms. Adams notified the
22 Department by telephone that petitioner's dba had been changed to Central Valley Business Solutions.
23 She also requested another change to the mailing and business address and added a new telephone
24 number.

25 At the time CVBS ceased business operations, it had unpaid tax, interest, and penalties totaling
26 \$25,987.52 arising from sales and use tax returns filed with no remittance for the period April 1, 2006,
27 through August 15, 2007. The Department determined that petitioner had purchased the business
28 assets from CVBS for \$40,000 on August 15, 2007. Since petitioner had not obtained a tax clearance

1 from the Department stating that no amount was due from CVBS and had not withheld from the
2 purchase price an amount sufficient to cover the outstanding liabilities of CVBS, as required by
3 Revenue and Taxation Code section 6811, the Department concluded that petitioner was liable as a
4 successor pursuant to Revenue and Taxation Code section 6812. Petitioner contends that the
5 agreement was only a proposed agreement, which was never consummated. Petitioner states that it
6 never actually purchased the business from CVBS but that from August 15, 2007, through
7 September 30, 2007, it managed the business for Mr. Chinn.

8 Petitioner states that it received a letter dated August 6, 2007, from the IRS stating that a
9 payment of \$23,626.91 was necessary to release the tax lien, and that Mr. Chinn convinced petitioner
10 that this amount would be reduced. Thus, petitioner states it signed the agreement believing that it had
11 the option to terminate it. Petitioner further asserts that it entered into a verbal agreement with
12 Mr. Chinn for an open-ended extension of the closing date.

13 Petitioner states that on September 11, 2007, CVBS received a denial from the IRS of its
14 request for penalty adjustment, and that CVBS received a Notice of Intent to Levy and a Notice of
15 State Tax Lien. In addition, petitioner states it learned that CVBS had an outstanding liability with the
16 Board, and the business assets were subject to a judgment lien. Upon discovery of these various
17 liabilities, petitioner states it elected to exercise its right to terminate the agreement. Mr. Chinn filed a
18 civil lawsuit against petitioner on November 21, 2007, and filed a dismissal of the action on
19 September 8, 2008.

20 Petitioner states that it never paid any money to CVBS or Mr. Chinn with respect to
21 consummating the agreement, and asserts that title to the assets of CVBS was never passed to
22 petitioner. Petitioner states Mr. Chinn was still in possession of the assets referred to in the agreement
23 in November 2007 and was attempting to sell them. In support, petitioner submitted a copy of an
24 advertisement dated November 1, 2007, and pictures taken through the store's windows. Petitioner
25 also asserts that Mr. Chinn sold the telephone number listed in the agreement to petitioner's
26 competitor, the Cash Register Company. Petitioner also states that: it never received the customer list
27 referred to in Exhibit E of the agreement; the lease agreement for the business location was still under
28 Mr. Chinn's name during the period August 15, 2007, through September 30, 2007; petitioner

1 maintained a completely separate bank account from CVBS when it was managing the company; and
2 neither the IRS nor EDD have held petitioner liable for CVBS's outstanding tax liabilities.

3 Several facts are consistent with petitioner's having actually purchased the business. Petitioner
4 contacted the Department on August 17, 2007, to change its address and telephone number to the
5 address and telephone number of CVBS and to change its business name to one very similar to the
6 predecessor's, with the same initials, Central Valley Business Services, effective August 15, 2007.
7 Mr. Chinn closed out the seller's permit for CVBS, and alleged in the lawsuit he filed in Fresno
8 Superior Court that petitioner purchased all of CVBS's business assets. Mr. Chinn also stated in a
9 letter dated October 1, 2007, that petitioner received company contracts with suppliers and an active
10 prospect list, in addition to contracts with CVBS clients. Petitioner also hired certain employees the
11 day after CVBS fired those same employees.

12 While petitioner argues that the agreement was orally amended to be only a management
13 agreement with no purchase or sale of business assets, this is in stark contrast to the agreement itself,
14 which specifically requires any such alleged amendment to be in writing. Petitioner argues that it was
15 not bound by that provision in the agreement because the agreement was never consummated. While
16 the agreement does include an option for petitioner to terminate the agreement, that termination needed
17 to occur prior to the closing date of August 15, 2007, pursuant to the terms of the agreement. The
18 existing evidence indicates that the agreement was not cancelled prior to that date. The requirement
19 that any amendment be in writing was *not* operative only if the agreement was fully consummated, but
20 rather was operative once the contract became effective, that is, upon its signing. (A requirement that
21 any amendment be in writing that became operative only after all significant elements of the contract
22 had been fully consummated would have been a mostly meaningless provision.) There is no evidence
23 of a valid amendment to the contract as petitioner alleges, and we find that petitioner did in fact
24 purchase the business as specified in the contract.

25 Petitioner argues that no monies were ever paid to CVBS or Mr. Chinn in exchange for the
26 business assets, and, thus, there was no consideration. Petitioner acknowledges that it paid various
27 expenses for a total amount of \$10,486.26. It states that those expenses were paid as a good faith
28 showing of its intent to consummate the purchase of the business, upon request of Mr. Chinn.

1 Petitioner further asserts that the amount of \$10,486.26 would have been credited toward the purchase
2 price in the event of closing of the agreement. However, these amounts were clearly paid in
3 consideration for the seller's promises under the contract. Furthermore, even if petitioner had not
4 made such payments to be credited to the purchaser price, its promise to pay was also sufficient
5 consideration. Even if petitioner did not pay the full purchase price of \$40,000, there was an agreed-
6 upon purchase price of \$40,000 and a promise by petitioner to pay that amount in exchange for the
7 transfer of the business. Thus, we reject any suggestion that the successor liability is limited to the
8 \$10,486.26 petitioner alleges it paid for existing liabilities of CVBS.

9 **RESOLVED ISSUE**

10 Petitioner submitted a request, signed under penalty of perjury, for relief of the penalties
11 imposed on the predecessor and included in the liability asserted to petitioner asserting that there was
12 no relationship between petitioner and the predecessor. Based on there being no evidence of a
13 relationship between petitioner and the predecessor, we recommend that the penalties imposed on the
14 predecessor be relieved as to petitioner. (Cal. Code Regs., tit. 18, § 1702, subd. (d)(2).)

15 **OTHER DEVELOPMENTS**

16 None.

17
18
19 Summary prepared by David H. Levine, Tax Counsel IV
20
21
22
23
24
25
26
27
28