

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

vs.

ROBERT W. GAFNEA  
d/b/a Pedro's Mexican Restaurant  
831 9th Avenue North  
Bessemer, AL 35021,

Taxpayer.

§ STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
§ ADMINISTRATIVE LAW DIVISION

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DOCKET NO. S. 94-263

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FINAL ORDER

The Revenue Department assessed State sales tax against Robert W. Gafnea ("Taxpayer") for the periods May - June 1992, and January March and May - June 1993; and also City of Bessemer sales tax for the periods May - June 1992 and May - June 1993. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 20, 1994. The Taxpayer represented himself at the hearing. Assistant counsel Wade Hope represented the Department.

The issue in this case is whether the Taxpayer is liable for State and City of Bessemer sales tax for the months of May and June 1992 even though he did not operate the business in question during those months.

The Taxpayer opened a restaurant in Birmingham and obtained an Alabama sales tax license from the Revenue Department in 1972. The Taxpayer operated the restaurant until February 1992, at which time he leased the building and equipment to another individual, Mack

Swiney. The Taxpayer failed to cancel his sales tax license or to notify the Department that he was quitting business at that time.

Swiney operated the restaurant from February until June 1992 and filed sales tax returns with the Department using the Taxpayer's sales tax number. Unfortunately, no money was paid with the returns. Swiney also failed to make the monthly lease payments to the Taxpayer. The Taxpayer consequently took over the restaurant on June 27, 1992, and continued operating the restaurant until sometime in 1993.

The Department subsequently assessed the Taxpayer for delinquent sales tax, penalty and interest for the months in issue.

The Taxpayer concedes that he is liable for all periods after June 1992, but that he should not be held liable for May and June 1992 because Swiney operated the business during that period. The Taxpayer testified that Swiney used his sales tax number without his permission.

The Department contends that the Taxpayer is liable for the entire assessment period because (1) the Taxpayer failed to file a closing return and notify the Department that he was quitting business in January 1992, and (2) even if Swiney is primarily liable for the February - June 1992 period, the Taxpayer is also liable as a successor in business to Swiney pursuant to Code of Ala. 1975, §40-23-25.

Section 40-23-25 provides that if a person subject to sales tax shall sell his business, he shall be required to file a return within 30 days from when he quits business. The successor in business is then liable for all outstanding and subsequent tax due.

Section 40-23-25 does not specify that the person quitting business shall file a "final" return and notify the Department at that time that he is quitting business. However, if a taxpayer fails to do so, his account remains active and he subjects himself to potential liability, as in this case.

The returns for February - June 1992 were filed in the Taxpayer's name and under his sales tax number. Consequently, the Department correctly assessed the Taxpayer for the sales tax that accrued during those months.

In any case, even if Swiney is primarily liable for the February - June 1992 taxes, the Taxpayer is still liable as a successor in business under §40-23-25. The Taxpayer did not purchase the business from Swiney, but merely took it over after Swiney failed to make the lease payments. However, the payment of purchase money is not necessary for a successor to be liable under §40-23-25. That section provides that the successor "shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner."

See generally, Bank of Commerce v. Woods, 585 S.W.2d 577; A. Copeland Enterprises v. Commissioner of Revenue, 703 S.W.2d 624.

See also, Admin. Law Docket No. S. 89-202. The Taxpayer succeeded Swiney in running the business and thus is liable for the unpaid taxes owed by Swiney.

The above considered, the assessments in issue are affirmed and judgment is entered against Robert W. Gafnea for State sales tax in the amount of \$1,656.85 (assessment of \$2,056.85 less \$400.00 previously paid), and City of Bessemer sales tax in the amount of \$1,946.60.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on September 26, 1994.

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BILL THOMPSON  
Chief Administrative Law Judge