OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **NBAC CAFE, LLC**	OTA Case No. 18011948 Date Issued: February 14, 2019

OPINION

Representing the Parties:

For Appellant:	Irene P. Tse, Attorney
For Respondent:	Kevin C. Hanks, Chief Headquarters Operations Division
For Office of Tax Appeals:	Richard Zellmer, Business Tax Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 6561,[1] NBAC Café, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a timely petition for reconsideration of a Notice of Successor Liability (NOSL). The NOSL is for $3,444.86 in tax,[2] plus applicable interest, and penalties totaling $364.50, representing the unpaid liability of J Ventures Restaurant Group (J Ventures), for the period October 1, 2012, through March 31, 2013. The NOSL reflects CDTFA's determination that appellant is liable as a successor for J Ventures' unpaid tax liability in accordance with section 6812.

Appellant waived its right to an oral hearing in this matter, and therefore the matter is being decided based on the written record.

[1] Unless otherwise indicated, all statutory ("section" or "§") references are to sections of the Revenue and Taxation Code.

[2] As noted in the Findings of Fact, below, subsequent to the issuance of the NOSL various payments have been made that have reduced the tax amount remaining unpaid to $719.27, plus applicable interest.

ISSUE

Whether appellant is liable as a successor for the unpaid tax liabilities of J Ventures.

FACTUAL FINDINGS

1. Appellant and J Ventures entered into a Purchase and Sale of a Business Agreement (Purchase Agreement), dated April 1, 2013, for appellant to purchase from J Ventures, the business known as the Avocado Café, for a purchase price of $8,306.62.
2. Section 1 of the Purchase Agreement expressly states that appellant agrees to purchase the tangible assets described in Schedule A of the Purchase Agreement, as well as items including the client list, mailing list, stock in trade, and good-will. Section 5(A) of the Purchase Agreement specifically provides that the business telephone numbers will be transferred to appellant, and the telephone numbers were manually typed by the parties onto that section of the Purchase Agreement. Section 5(C) of the Purchase Agreement states that, after the sale is complete, appellant will advise persons attempting to contact J Ventures at the business telephone numbers that J Ventures has transferred "its business" to appellant. Section 7(A) of the Purchase Agreement provides that for a period of 180 days after the sale, J Ventures will instruct appellant regarding any and all matters pertaining to the operation of the business. Section 7(C) of the Purchase Agreement states that appellant will send notices to J Ventures' clients, vendors, suppliers, and other appropriate persons, notifying those persons that appellant has acquired "the Seller's (J Ventures) business."
3. Section 8(E) of the Purchase Agreement states that the seller will hold the purchaser free and harmless from any tax liability arising out of the operation of the business prior to the date of closing of the purchase transaction.
4. It is undisputed that J Ventures had outstanding liabilities owed to CDTFA for non-remittance sales and use tax returns filed for the fourth quarter of 2012 and the first quarter of 2013.
5. CDTFA determined that appellant purchased a business from J Ventures, and failed to obtain a tax clearance certificate from CDTFA or withhold sufficient amount of the purchase price to cover J Ventures' unpaid tax liability. Therefore, CDTFA determined

that appellant was liable as a successor for the unpaid liabilities of J Ventures, pursuant to section 6812.

6. On October 7, 2015, CDTFA issued an NOSL to appellant, in the amount of $3,444.86 tax, plus accrued interest, and penalties totaling $364.50, for the period October 1, 2012, through March 31, 2013.

7. J Ventures had made payments totaling $2,725.59 towards the aforementioned liability, thus reducing the tax to $719.27.

8. CDTFA subsequently decided to delete the penalties, and thus, the remaining dispute involves tax of $719.27, plus applicable interest.

9. In a Decision and Recommendation issued August 1, 2017, CDTFA concluded that appellant is liable for the remaining unpaid tax liabilities of J Ventures of $719.27 plus interest, and thus, CDTFA denied appellant's petition for reconsideration. This appeal followed.

DISCUSSION

When a taxpayer challenges a Notice of Determination, CDTFA has the burden to explain the basis for that deficiency. (*Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610.) Generally, where a taxpayer challenges the additional tax, the government bears the initial burden of establishing a prima facie case that taxes are owed. (*Schuman Aviation Co. Ltd. v. U.S.* (2011) 816 F.Supp.2d 941, 950.) Based on *Riley B's, Inc.* and *Schuman Aviation Co. Ltd.*, we conclude that when a taxpayer challenges a Notice of Successor Liability, CDTFA must establish a prima facie case that taxes are owed by proving the basis for that deficiency and providing evidence sufficient to establish that its determination is reasonable. Where CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to explain why CDTFA's asserted deficiency is not valid. (*Riley B's, Inc., supra,* at pp. 615-616.)

Section 6811 provides that if a person who has a sales tax liability sells his or her business or stock of goods, his or her successor shall withhold a sufficient amount (up to the amount of the purchase price of the business or stock of goods) to cover the tax liability of the former owner unless the former owner produces a receipt or certificate from CDTFA showing that the tax liability has been paid. Section 6812(a) provides, "If the purchaser of a business or stock of goods fails to withhold from the purchase price as required, he or she becomes personally liable for the payment of the amount required to be withheld by him or her to the

extent of the purchase price, valued in money." The liability of the successor or purchaser of a business or stock of goods includes all tax, interest, and penalties incurred by the former owner as a result of operating the business. (Cal. Code Regs., tit. 18, § 1702(b).)

The purchaser of the business or stock of goods will be released from further obligation to withhold from the purchase price if he or she obtains a certificate from CDTFA stating that no taxes, interest, or penalties are due from a predecessor. (Cal. Code Regs., tit. 18, § 1702(c).) He or she also will be released if he or she makes a written request to CDTFA for a certificate and CDTFA does not issue the certificate or mail to the purchaser a notice of the amount of the tax, interest, and penalties that must be paid as a condition of issuing the certificate within 60 days after the latest of the following dates: (1) the date CDTFA receives a written request from the purchaser for a certificate; or (2) the date of the sale of the business or stock of goods; or (3) the date the former owner's records are made available for audit. (*Id.*)

On appeal, appellant argues that it is not liable as a successor because it only purchased the assets of J Venture and did not buy the business or a stock of goods. Appellant asserts that it never operated the business under the name "Avocado Café." However, we note that Section 1 of the Purchase Agreement specifically provides that appellant agreed to purchase various intangible assets, including goodwill, a client list, a mailing list, use of the "Avocado Café" name, and any contractual rights related to the business. We note that the name "Avocado Café" was manually typed by the parties into that section of the Purchase Agreement.

Furthermore, Section 5(A) of the Purchase Agreement specifically provides that the business telephone numbers will be transferred to appellant, and the telephone numbers were manually typed by the parties onto that section of the Purchase Agreement. Section 5(C) of the Purchase Agreement states that, after the sale is complete, appellant will advise persons attempting to contact J Ventures at the business telephone numbers that J Ventures has transferred "its business" to appellant. Section 7(A) of the Purchase Agreement provides that for a period of 180 days after the sale, J Ventures will instruct appellant regarding any and all matters pertaining to the operation of the business. Section 7(C) of the Purchase Agreement states that appellant will send notices to J Ventures' clients, vendors, suppliers, and other appropriate persons, notifying those persons that appellant has acquired "the Seller's [(J Ventures')] business."

Generally, the clear and explicit language of a contract governs its interpretation. (Cal. Civ. Code, § 1638.) Therefore, the foregoing explicit terms of the Purchase Agreement establish that appellant acquired the intangible assets of the business, such as goodwill, and not just the fixed assets. Appellant has not provided evidence sufficient to contradict the clear language of the Purchase Agreement or to otherwise show that both it and J Ventures did not intend to sell the business. Thus, we conclude that appellant purchased the business. The fact that after the sale appellant may not have operated the business under the name "Avocado Café," is not relevant to our determination that appellant *purchased* the business.

Appellant argues that it should not be held liable as a successor because it has not purchased a stock of goods from J Ventures, nor purchased an ownership interest in J Ventures. However, the purchasing of a business is itself sufficient to trigger a successor liability. There is no requirement that a stock of goods or ownership interest also be purchased.

Appellant argues that according to section 8D of the Purchase Agreement, J Ventures has contractually agreed to pay all of its past due taxes, and thus, CDTFA should pursue J Ventures, not appellant, for the unpaid taxes. We note that such an agreement has no impact on appellant's liability as a successor because the Purchase Agreement is a private contract between appellant and J Ventures, and CDTFA is not a party to the contract. There is no provision in the Sales and Use Tax Law that would allow a taxpayer to legally shift its tax liability to another party. As a result, any contractual shifting of tax burdens is a matter exclusively between the contracting parties, and has no effect on appellant's successor liability vis-à-vis the State. (Civil Code § 1656.1; *Pacific Coast Engineering Company v. State of California* (1952) 111 Cal.App.2d 31, 34.) Of course, any amounts paid towards the liabilities at issue here by J Ventures or its prior owner will reduce the amount that may be collected from appellant.

Therefore, we conclude that appellant is liable as a successor for the unpaid liabilities of J Ventures.

HOLDING

Appellant is liable as a successor for the unpaid tax liabilities of J Ventures.

DISPOSITION

CDTFA's action in relieving the penalties, but otherwise denying the petition for reconsideration, is sustained.

DocuSigned by:
Jeff Angeja
0D390BC3CCB14A9...
Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Nguyen Dang
4D465973FB44469...
Nguyen Dang
Administrative Law Judge

Concurring opinion of Jeffrey Margolis, writing separately:

I agree with the majority holding but write separately to address appellant's contention that it should be viewed as having merely acquired equipment from the seller, not its business, since it did not acquire and/or use any of the intangible assets associated with the seller's business and since the seller's business had ceased operations prior to the date of the sale. It may well be true, as appellant alleges, that it did not intend to acquire any of the intangible assets associated with the seller's business and that those assets, if acquired, had no value to appellant. The written contract between appellant and the seller was a simple pre-printed form, containing various blanks that the parties completed and signed, apparently without the benefit of any attorneys. The intangible assets of the seller's business were only mentioned in the pre-printed portion of the form; they were not mentioned in the "Asset Schedule" that was attached to the agreement as an exhibit. It would not be unreasonable for one to conclude that most, perhaps all, of the types of intangible assets listed in the agreement either did not exist or had no value. Nevertheless, appellants are bound by the form of the agreement they signed, and that agreement was styled as being for the "Purchase and Sale of a Business." (See generally *Appeal of Halcyon Services, Inc.*, 78-SBE-053, July 26, 1978 ["Strong proof by the taxpayer is required to contradict the express terms of the sales agreement."]; *Norwest Corp. et al. v. Commissioner*

(1988) 111 T.C. 105, 140-147.) Hence, I agree with the majority's conclusion that appellant has not established error in CDTFA's determination that appellant has successor liability for the unpaid tax liabilities of J Ventures.

DocuSigned by:
Jeffrey I. Margolis
5E9822FBB1BA41B...

Jeffrey I. Margolis
Administrative Law Judge