

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeals of:
RUZBEHJON, INC.

) OTA Case Nos. 18011986, 18012014
) CDTFA Case IDs 608305, 918142
) CDTFA Account No. SR AS 101-317388
) Date Issued: May 29, 2019
)

OPINION

Representing the Parties:

For Appellant:

Roozbeh Farahanipour, President

For Respondent:

Mengjun He, Tax Counsel III
Monica Silva, Tax Counsel IV
Lisa Renati, Supervising Tax Auditor III

For Office of Tax Appeals:

Richard Zellmer, Business Tax Specialist III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6814 and 6902, Ruzbehjon, Inc. (appellant) appeals an action by the California Department of Tax and Fee Administration (Department) determining that appellant was liable as a successor for the unpaid liabilities of Saenirp & Saenirp, Inc. (the corporation), which liability consisted of \$39,418.16 in tax, and applicable interest, for the period January 1, 2008, through October 31, 2009.

Office of Tax Appeals (OTA) Administrative Law Judges Michael F. Geary, Nguyen Dang, and Jeffrey I. Margolis held an oral hearing for this matter in Los Angeles, California, on February 19, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Is appellant liable as a successor for the unpaid tax liabilities of the corporation, and, if it is, what is the amount of that liability?
2. Is appellant entitled to interest abatement?
3. Was appellant’s claim for refund timely?

FACTUAL FINDINGS

1. The corporation operated a restaurant in Los Angeles, California, until November 1, 2009, when it sold the business to appellant.
2. At the time of the sale, the corporation had unpaid liabilities of \$39,418.16 in tax, plus interest, and penalties of \$3,946.80 for the period January 1, 2008, through October 31, 2009.
3. Prior to payment of the purchase price, the corporation did not give appellant a receipt from the Board of Equalization (BOE) showing that its taxes, interest, and penalties (tax liability) had been paid, or a certificate stating the amount that must be withheld to pay the amount due (tax clearance), and appellant did not request or obtain such a tax clearance from the BOE.
4. On November 12, 2009, the corporation's president informed the Board of Equalization (BOE), the Department's predecessor, that the corporation sold the business to appellant. The BOE obtained a sales contract dated November 1, 2009, which indicated appellant purchased the restaurant from the corporation for \$5,000. This was the BOE's first notice concerning the sale of the business.
5. The BOE concluded that appellant was liable as a successor for the unpaid liabilities of the corporation. On December 22, 2009, the BOE issued a Notice of Successor Liability (first NOSL), to appellant for \$1,137.50 in accrued interest, and \$3,862.50 in penalties, totaling \$5,000.¹
6. Appellant timely filed a petition for redetermination of the first NOSL, arguing that it is not liable for the corporation's unpaid interest and penalties, and requesting relief from both.
7. The BOE cancelled the first NOSL and timely issued a second NOSL to appellant on April 7, 2010, for \$5,000 tax only.
8. Appellant did not timely file a petition for reconsideration of the second NOSL, which went final on May 7, 2010.
9. From July 22, 2010, through July 10, 2011, appellant paid the asserted \$5,000 liability in full.

¹ As we explain below, a successor's liability is limited to the purchase price of the business or stock of goods. (R&TC, §§ 6811, 6812.) Thus, although the corporation had a liability totaling \$43,364.96, plus interest, the BOE limited the first NOSL to interest and penalties equal to the reported purchase price of \$5,000. The evidence does not show why the BOE included no tax.

10. On or about June 27, 2011, the corporation gave the BOE another contract for its sale of the business to appellant. This second contract, dated December 3, 2009, indicated that appellant purchased the restaurant business from the corporation for consideration totaling \$96,000, not \$5,000, as indicated in the contract originally provided, and part of that \$96,000 was appellant's assumption of the corporation's "\$44,000" liability to the BOE. This agreement also states that any prior agreements are null and void.²
11. On March 13, 2012, the BOE timely issued a third NOSL to appellant for tax of \$34,418.16 (the corporation's tax liability of \$39,418.16 less \$5,000 that appellant had previously paid), accrued interest, and penalties of \$3,946.80.
12. Appellant timely filed a petition for redetermination of the third NOSL. (The Department's case ID 608305.)
13. There were suits and countersuits between the corporation or its owner, Mr. John Moudakas, and appellant and its owner, Mr. Farahanipour, for damages allegedly arising from the contract of sale and related agreements.³ That case went to trial in the Los Angeles County Superior Court (the Court) on November 5 and 6, 2014. As a result of that trial, the Court found, among other things, that appellant assumed the corporation's \$44,000 liability to the BOE and that its representation to the Court that it settled the BOE claim for \$5,000 was inaccurate.
14. On August 6, 2015, the BOE's Appeals Division (Appeals Division) held an appeals conference (Appeals Division conference), at which appellant filed a claim for refund of the \$5,000 previously paid. (The Department's case ID 918142.)
15. The attorney who was handling the appeal left the Appeals Division to work elsewhere at the BOE. By letter dated October 19, 2015, the Appeals Division informed appellant that its appeal would be reassigned to another attorney, who would decide the issues based on the written record (including the first attorney's conference notes) unless appellant opted for a second Appeals Division conference, in which case the matter would be reassigned in due course. Appellant opted for a second Appeals Division conference, which was held on July 26, 2016.

² There may also have been a third agreement, dated October 20, 2009.

³ We find little reason to distinguish in our analysis between Mr. Moudakis and the corporation, or between appellant and its owner, Mr. Farahanipour. As discussed in more detail below, the fact that the contract of sale and the lawsuits were principally in the names of the individuals is of little significance to our analysis.

16. On August 24, 2016, appellant filed a request for relief of all interest and penalties.
17. On September 9, 2016, the Department recommended that the second NOSL be cancelled, that the \$5,000 in payments applied to that NOSL be applied to the third NOSL, and that the penalties imposed against appellant be relieved.
18. In its January 27, 2017 Decision and Recommendation (D&R), the Appeals Division found that appellant is liable as a successor for the corporation's liability, and that interest should not be relieved. In the D&R, the Appeals Division stated that it did not agree with the Department's recommendation that the second NOSL be cancelled. Nevertheless, the Appeals Division accepted the BOE's recommendation because it was in appellant's favor. Thus, in the D&R, the Appeals Bureau concluded that the second NOSL should be cancelled, the \$5,000 in payments should be applied to the third NOSL, the penalties should be deleted, and the petition for redetermination should be denied in all other respects.
19. On June 27, 2017, the BOE filed a request for reconsideration of the D&R, arguing that the second NOSL should not be cancelled. Appellant opposed the request, arguing that it was not timely filed, that the asserted liability was not valid, and that the Court ordered appellant to pay the amount claimed by the BOE to the seller of the business.
20. In its August 22, 2017 Supplemental Decision and Recommendation (SD&R), the Department's Appeals Bureau reversed the recommendation that the second NOSL be cancelled.⁴ It recommended that the penalties be deleted, that the petition for redetermination be denied in all other respects. The SD&R also concluded that appellant's claim for refund was not timely, and it was therefore barred by the statute of limitations. This timely appeal followed.

DISCUSSION

Issue 1 – Is appellant liable as a successor for the unpaid tax liabilities of the corporation, and, if it is, what is the amount of that liability?

When the Department is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, the Department may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession.

⁴The California Legislature transferred many of the BOE's responsibilities to the Department effective July 1, 2017. The BOE's former Appeals Division became the Department's Appeals Bureau.

(R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (See *Schuman Aviation Co. Ltd. v. U.S.* (2011) 816 F.Supp.2d 941, 950; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers* (2001- SBE- 001) 2019 WL 1187160.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 616.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (See *ibid*; see also, *Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.) Because OTA weighs evidence submitted by the parties to redetermine the correct tax, evidence that merely casts doubt on the BOE's (or Department's) calculation of tax is not an adequate explanation and may not result in an adjustment. When the Department has carried its burden, the taxpayer's evidence must be sufficient to enable the panel of judges to make specific adjustments or to direct the Department to make them. That means that the taxpayer must prove both (1) the tax assessment is incorrect, and (2) the correct amount of the tax. (*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 442; *Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744.)

R&TC section 6811 provides that if a person who has a sales or use tax liability sells his or her business or stock of goods, the purchaser must withhold from the purchase price an amount sufficient to cover the tax liability of the former owner unless the former owner produces a receipt or certificate from the Department showing that its tax liability has been paid.⁵ In this context, “ ‘withhold’ . . . does not necessarily mean having physical assets in hand but simply means dealing with the purchase consideration in such a manner as to deny to the seller the benefit of the purchase consideration and to thereby make a portion of it available for the satisfaction of the tax liability.” (*Knudsen Dairy Products Co. v. State Bd. of Equalization*

⁵ The purchaser also will be released from further obligation to withhold the purchase price if he or she obtains a certificate from the Department stating that no taxes, interest, or penalties are due from a predecessor, or he or she has made a written request to the Department for a certificate and the Department 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 the Department 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. (Cal. Code Regs., tit. 18, § 1702(c).) The certificate may be issued after the payment of all amounts due under the Sales and Use Tax Law, according to the records of the Department as of the date of the certificate, or after the payment of the amounts, including amounts not yet ascertained, is secured to the satisfaction of the Department. (*Ibid.*)

(1970) 12 Cal.App.3d 47, 55 (*Knudsen*.) In other words, the obligation of the buyer is to not give to the seller the funds that the seller owes to the BOE (now the Department).

If the purchaser fails to withhold payment, the purchaser 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. (R&TC, § 6812(a.) California Code of Regulations, title 18, section (Regulation) 1702(b) provides that the liability of the successor or purchaser of a business or stock of goods includes all tax liability incurred by the former owner as a result of operating the business and that remain unpaid at the time of the purchase of the business or stock of goods. A NOSL must be issued within three years after the date the BOE first received written notice of the purchase of the business or stock of goods. (Regulation 1702(d).)

Appellant has made several arguments. It argues that the Court ordered it to pay the asserted tax liability to Mr. John Moudakis, the person who allegedly sold the business to appellant, and it would be unfair to make appellant pay that same amount again, this time to the Department, particularly since the BOE was aware of that lawsuit and declined to participate to protect its own interests. It contends that we should require the Department to collect the amount owed from Mr. Moudakis, and refers to a D&R issued in an appeal by Mr. Moudakis wherein the Appeals Division found him personally responsible for the unpaid liabilities of the corporation. Appellant also argues that the BOE appeals process favored the BOE, as evidenced by the fact that the Appeals Division allowed a late request for reconsideration. It contends we should not consider the SD&R or allow the Department to cancel the second NOSL, which had already been paid in full when the SD&R issued. In effect, appellant argues that the liability has been satisfied by its payments totaling \$5,000. Finally, appellant asserts that it purchased the restaurant from Mr. Moudakis, not from the corporation, and it argues that there is no evidence showing that the alleged liability of the corporation was a liability of Mr. Moudakis.

It is undisputed that appellant purchased the restaurant on or about November 1, 2009, and there is little real dispute regarding the amount that appellant agreed to pay for the business. The purpose of the \$5,000 contract first obtained by the BOE is unclear, but appellant does not dispute the fact that the final, agreed-upon purchase price was \$96,000, which is consistent with the December 3, 2009 contract and appellant's exhibits, which indicate that the \$96,000 purchase price included appellant's assumptions of various liabilities of the corporation, including \$44,000

owed to the BOE.⁶ The Department has established, and appellant does not dispute, that the corporation's unpaid sales and use tax liabilities included the amount at issue in the appeal and that appellant did not obtain a tax clearance from the corporation or the Department, or request one from the Department. Thus, we find that appellant was required to withhold from the purchase price an amount sufficient to cover the tax liability of the former owner. But it is also clear from the evidence that appellant "withheld" \$44,000 for payment of the corporation's tax liabilities to the BOE, at least until the Court ordered appellant to pay the \$50,000 of state and federal tax liabilities it had assumed to Mr. Moudakis instead of to the tax agencies directly. If appellant did not withhold the required amount, it should be subject to successor liability, but only to the extent it did not comply, that is, only to the extent it did not "deny to the seller the benefit of the purchase consideration." (*Knudsen, supra*, at 539.) It should not be held liable if it could not perform the duty to withhold under R&TC section 6811. (*Ibid.*)

It is clear from the evidence that appellant was reluctant to pay to Mr. Moudakis the money that appellant knew he might eventually have to pay directly to the BOE when the disputed NOSL was final. His concerns, which, we infer, were rooted in his belief that Mr. Moudakis could not be trusted to pay the funds to the BOE and the IRS, were shared with the Court and, at least according to appellant, with the BOE.⁷ Appellant asked the Court to allow him to pay the BOE directly. The Court refused because it had no evidence to show that appellant could be personally responsible for the tax liabilities.

Based on the evidence, we find that appellant withheld sufficient funds to pay the corporation's tax liabilities to the BOE, and that, before the NOSL issued to it became final, the Court ordered appellant to pay the bulk of those funds directly to Mr. Moudakis. We also find that the Court awarded the \$50,000 to Mr. Moudakis specifically because appellant had failed to pay the BOE and the IRS as agreed, and the Court concluded that Mr. Moudakis, whose corporation was clearly liable for the taxes, should not have to depend on appellant to make the

⁶ We note that appellant's exhibit 1 indicates that long after appellant was aware that the corporation, and he as successor, owed over \$38,000, plus interest, to the BOE, appellant represented to the Los Angeles Superior Court that he settled the sales and use tax liability with the BOE for \$5,000.

⁷ According to the testimony of Mr. Farahanipour, appellant informed the BOE regarding the Court's order approximately 30 days before the final transfer of the funds to Mr. Moudakis, and it provided copies of the relevant documents, but the BOE informed appellant that there was nothing it could do. According to the D&R, the Department agrees that appellant made a "very strong effort to extinguish the liability" (D&R, p. 6:26-27), but it allegedly explained to the Appeals Division that it did not learn of the Court's order until after the transfer of the funds, and it had no final liability that it could assert against Mr. Moudakis at that time.

payments.⁸ While it is true that, with that payment, appellant no longer denied to the corporation the benefit of that \$50,000 (part of the \$96,000 purchase consideration), appellant did not pay it voluntarily. The Court ordered appellant to pay to Mr. Moudakis the money appellant had withheld for the seller's tax liabilities. We find nothing in the Sales and Use Tax Law that warrants a finding, under the unique factual situation presented here, that appellant failed to withhold that amount to pay the subject tax liabilities. The question now is how this should impact the calculation of appellant's liability for the corporation's unpaid tax liabilities to the state.

The Court referred to appellant's agreement to assume balances owed to the BOE (\$44,000⁹) and the IRS (\$16,000) and to last known balances for those accounts of \$55,732 and \$36,466, respectively, for a total of \$92,198.¹⁰ We find nothing in the evidence to explain how the Court calculated the \$50,000 awarded to Mr. Moudakis for damages sustained from appellant's failure to pay the corporation's tax liabilities. That awarded amount was \$10,000 less than the assumed liabilities and more than \$40,000 less than the "current balances." The originally assumed liabilities totaled \$60,000, with 73.33 percent of that ($44,000 \div 60,000 = .7333$) being attributable to the BOE liabilities, and 26.666 percent ($16,000 \div 60,000 = .26666$) being attributable to the IRS liabilities. According to the Court's most recent information, the BOE liabilities were 60.45 percent of the total ($55,732 \div 92,198 = .6045$) and the IRS liabilities were 39.55 percent of the total ($36,466 \div 92,198 = .3955$). Because the Court did not award even the originally assumed amounts, we conclude that it is more reasonable to use the original numbers to calculate a ratio to determine how much of the \$50,000 payment should be allocated to payment of the BOE liabilities. On that basis, we find that the Court ordered appellant to pay \$36,665 ($\$50,000 \times .7333 = \$36,665$) of the withheld funds to Mr. Moudakis specifically for payment of the BOE liabilities, thus preventing appellant from paying that amount directly to the

⁸ The Court specifically denied appellant's motion that it be allowed to pay the money to the BOE and the IRS directly.

⁹ The Court's Statement of Decision refers to \$42,000, but the contract states the amount was \$44,000.

¹⁰ We have no evidence of the current balances.

Department. Consequently, we conclude that appellant's remaining successor liability, \$34,418.16 plus all accrued interest, shall be reduced by \$36,665.¹¹

Regarding appellant's argument that he has already paid almost \$40,000 to Mr. Moudakis and that the Department should collect the amount owed from him, we have already given fair consideration to appellant's payment to Mr. Moudakis, who remains liable for the entire amount still owed by the corporation, including the penalties the Department has agreed to delete from appellant's liability. The Department can only collect the tax once, but we have no authority to dictate when or from whom the Department should collect.

Regarding appellant's criticism of the BOE's internal appeal process, we have provided the parties a full opportunity to present evidence and argument and have afforded the same opportunities to both. As we explained to the parties at the beginning of the hearing, OTA is an independent agency, entirely separate from the Department. We have been charged by the Legislature to provide taxpayers an opportunity to have their appeals heard by tax experts who are independent, knowledgeable, and fair, using processes that are accessible, understandable, and transparent. Nothing that occurred in the course of appellant's appeal at the BOE has prevented us from providing all of that to appellant here.

Regarding appellant's argument that we should not allow the BOE to reverse its recommendation to cancel the second NOSL, we note that a taxpayer is allowed to change its positions and offer new or different arguments as long as its appeal is pending. (R&TC, § 6561.5.) The same opportunities are afforded to the Department, as long as it does not seek to increase the amount of the determination, and even that is allowed under some circumstances. (See R&TC, § 6563.) We are aware of no prohibition against the BOE changing its mind regarding cancellation of the second NOSL, and each of the three NOSLs were issued within the time allowed. Appellant has not argued that the change caused the BOE to duplicate any portion of the liability and we find there was no duplication.¹²

¹¹ To be clear, we are not reducing appellant's remaining liability for tax by \$36,665. We are reducing appellant's total remaining liability (\$34,418.16 + interest) by \$36,665.

¹² Appellant's successor liability was \$39,418.16 tax. The third NOSL was for \$34,418.16. As explained in the SD&R, if the second NOSL was cancelled and the \$5,000 in payments was applied to the third NOSL, \$5,000 of the liability would have been lost.

Appellant's contention that his payment of the \$5,000 asserted in the second NOSL should have ended the matter reflects its misunderstanding of the law, which clearly imposed on it the obligation to withhold funds to satisfy the corporation's tax liability to the state.

Finally, regarding appellant's argument that he purchased the restaurant from Mr. Moudakis, not from the corporation, the fact that Mr. Moudakis may have been less than diligent about observing corporate formalities does not affect appellant's liability. There is no dispute that the corporation operated the restaurant prior to appellant entering into a contract with Mr. Moudakis for the purchase of the business, and that, after the execution of the contract, appellant began operating the same restaurant at the same location. Appellant argued to the Court that the corporation owned the business and that appellant assumed the tax liabilities of the corporation, and the November 1, 2009 agreement expressly pertains to appellant's purchase of the corporation. Appellant purchased the business and it is immaterial that at least some of the documents appear to indicate that he purchased it from Mr. Moudakis.

In summary, we conclude that appellant is liable, as a successor, for the unpaid taxes owed by the corporation, but that liability, consisting of \$39,418 in tax, plus accrued interest, should be reduced by the \$5,000 previously paid by appellant to satisfy the second NOSL, and by the \$36,665 appellant withheld to pay the BOE but was ordered by the Court to pay directly to the corporation.

Issue 2 – Is appellant entitled to interest abatement?

The amount of the determination shall bear interest from the last day of the month following the quarterly period for which the amount should have been paid to the date of payment. (R&TC, § 6482.) The Department may relieve all or any part of the interest imposed on a person where the failure to pay tax is due in whole or in part to an unreasonable error or delay by an employee of the Department (or the BOE) acting in his or her official capacity. (R&TC, § 6593.5(a)(1).) An error or delay sufficient to warrant interest relief can occur only if no significant aspect of the error or delay is attributable to an act of, or a failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person seeking relief from interest must file a statement under penalty of perjury setting forth the facts on which the claim for relief is based. (R&TC, § 6593.5(c).)

Appellant filed a request for relief of interest dated August 24, 2016, and signed under penalty of perjury. It argues there that there was no relationship between it and either the

corporation or Mr. Moudakis. In a later brief, appellant argued that the following acts or omissions by an employee of the Department (or the BOE) resulted in an unreasonable delay: 1) the BOE's initial acceptance of \$5,000 as the purchase price of the business, which was later increased to the \$96,000 purchase price; 2) the BOE's postponement of the Appeals Division conference pending conclusion of the civil court case matter; 3) after the civil court case was completed, the BOE made no attempt to collect the unpaid taxes from the judgment in the civil court matter; 4) the case was delayed 8 to 12 months because the Appeals Division attorney was temporarily reassigned to a different part of the BOE; and 5) the case was delayed another 7 months after the Appeals Division attorney returned. We will examine the entire period at issue.

The BOE received information regarding the transfer of this business on November 12, 2009, and issued the first NOSL on December 22, 2009. On January 13, 2010, appellant filed a petition for redetermination. The Department realized that the first NOSL erroneously allocated the entire successor liability to interest and penalties. It cancelled the first NOSL and issued a second NOSL dated April 7, 2010. The BOE issued the second NOSL within the period of time allowed by the statute of limitations, and we find that it is not unreasonable for the BOE to take approximately three months to examine the facts of this case and issue the second NOSL. In addition, although the BOE made an error in allocating the entire successor liability to interest and penalties in the first NOSL, the Department corrected its error in a timely manner.

Appellant did not file a petition for reconsideration of the second NOSL, and consequently, it went final on May 7, 2010. On June 10, 2010, appellant entered into an agreement to pay the second NOSL in installments. Appellant made voluntary payments towards the second NOSL until July 10, 2011. From April 7, 2010, through July 10, 2011, the BOE had no duty to act because the first NOSL had been cancelled, which rendered the appeal made in connection with the first NOSL moot, and appellant did not file an appeal of the second NOSL.

On June 27, 2011, the BOE received new information (a new sales contract) from the corporation, and based on that new information, it concluded that the successor liability should have been much higher than the \$5,000 amount that was determined in the second NOSL. The BOE investigated and confirmed that the new information was accurate. It issued the third NOSL on March 12, 2012, within the period of time allowed by the statute of limitations. We also note that the Department issued the third NOSL because appellant did not request a tax

clearance or otherwise let it know about the December 3, 2009 contract. We find that there was no unreasonable delay attributable to a BOE employee through March 12, 2012.

Appellant filed a petition for reconsideration of the third NOSL on April 8, 2012. The BOE acknowledged the petition for reconsideration in April 2012, and promptly sent the file to its Culver City district office for further processing, which took about 16 months. According to the Department, the average amount of time that it took a district office to process a case of this type was 14.7 months. That difference is of little consequence and not something that would require a further explanation by the Department. After the Culver City district office completed its work on this case, it returned the file to Sacramento in September 2013. The BOE's Petition Section spent one month summarizing and preparing the case for an Appeals Division conference, after which time the case was transferred to the BOE's Case Management Section for scheduling of an Appeals Division conference. An Appeals Division conference for this case was originally scheduled on May 28, 2014, approximately eight months after the case was received by the Case Management Section. We find that there was no unreasonable delay through May 28, 2014.

Appellant acknowledges that it requested that the Appeals Division conference be postponed because of the civil court matter. The appeal conference was postponed and rescheduled to November 18, 2014. Appellant requested another postponement of the Appeals Division conference because of the civil lawsuit between appellant and Mr. Moudakis. Thus, the Appeals Division conference was postponed a second time to August 5, 2015, and then to August 6, 2015, all at appellant's request. We find that there was no unreasonable delay by the Department through the August 6, 2015 Appeals Division conference.

Post-conference submissions concluded on September 10, 2015. In the normal course of events, the Appeals Division would have been expected to issue its D&R within 90 days, or by December 9, 2015 (Regulation 5265(a)), but in this case the Appeals Division attorney was reassigned to a different position outside of the Appeals Division and was unable to complete the D&R by that date. By letter dated October 19, 2015, the Appeals Division informed appellant and gave it the option of having another attorney write the D&R based on the written record, or having the matter go back into the Appeals Division conference queue to await a new conference assignment. Appellant chose the latter option. The Appeals Division could not always predict or control the reassignment of one of its attorneys. When it occurred in this case, the Appeals

Division gave appellant the option of a new conference. Appellant requested a second Appeals Division conference, which necessarily took several months to schedule. The second Appeals Division conference was held on July 26, 2016. We find that there was no unreasonable delay by the BOE through July 26, 2016.

After the second Appeals Division conference, there were post-conference submissions, which concluded on October 7, 2016. The D&R was issued within the allowed 90 days on January 27, 2017. On June 17, 2017, the Department filed a request for reconsideration of the D&R. The Appeals Bureau issued its SD&R on August 22, 2017, which is within the allowed 90 days. Based on the evidence, we find there were no unreasonable delays attributable to the BOE or the Department. On that basis, we conclude that appellant is not entitled to interest abatement.

Issue 3 – Was appellant’s claim for refund timely?

As relevant here, no refund could be approved by the BOE after three years from the last day of the month following the close of the quarterly period for which the overpayment was made, or, with respect to determinations, after six months from the date the determination becomes final, or after six months from the date of overpayment, whichever period expires later, unless a claim therefor is filed with the Department within that period. (R&TC, § 6902(a).) Failure to file a timely claim for refund constitutes a waiver of any demand against the State on account of overpayment. (R&TC, § 6905.)

The payments at issue were made from July 22, 2010, through July 10, 2011, and were applied to the second NOSL, which went final on May 7, 2010. The second NOSL was for the period January 1, 2008, through October 31, 2009. Appellant filed its claim for refund on August 5, 2016, which was more than six months after the finality date, and was more than six months after each of the payment dates, the last of which was July 10, 2011. The claim for refund was also filed more than three years from the last day of the month following the close of the last quarterly period for which the overpayment was made, which was the fourth quarter of 2009.¹³ Therefore, we conclude that appellant’s claim for refund was not timely and is therefore barred by the statute of limitations.


¹³ In order to be timely under the three-year statute, the claim for refund would have had to be filed no later than January 31, 2012, which is three years from the last day of the month following the close of the fourth quarter of 2009.

HOLDINGS

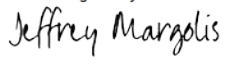
1. Appellant is liable, as a successor, for the unpaid taxes owed by the corporation, which liability consists of \$39,418 in tax, plus accrued interest, less \$36,665, which the Court ordered appellant to pay to the seller; and less the \$5,000 previously paid by appellant to satisfy the second NOSL.
2. Appellant is not entitled to interest abatement.
3. Appellant’s claim for refund was not timely and is therefore barred by the statute of limitations.

DISPOSITION

The Department’s actions relieving the penalties, finding that appellant’s claim for refund is barred by the statute of limitations, and denying appellant’s request for interest abatement are sustained. Its finding that appellant is liable as a successor for the unpaid liabilities of the corporation is also sustained, but that successor liability, consisting of \$39,418 in tax, plus accrued interest, should be reduced by \$36,665 and by the \$5,000 in payments previously made by appellant.

DocuSigned by:

 1A9B52EF68AC0C7
 Michael F. Geary
 Administrative Law Judge

I concur:

DocuSigned by:

 5E9822FBB1BA41B...
 Jeffrey I. Margolis
 Administrative Law Judge

CONCURRING IN PART AND DISSENTING IN PART

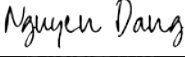
I agree with the majority decision in its entirety, except for its determination that a reduction to appellant's successor liability is warranted because it was "impossible" for appellant to withhold a portion of the purchase price.

The applicable rule, as stated in *Knudsen Dairy Products Co. v. State Bd. of Equalization* (1970) 12 Cal.App.3d 47, 54, is that "successor liability cannot be imposed when the duty to withhold, as here defined, under [R&TC] section 6811 cannot possibly be performed by the successor." The words "cannot possibly be performed," implies that the purchaser was unable to withhold at any time following the purchase of the business. Such is not the case here.

The record shows that appellant purchased the corporation's business in exchange for \$10,000 and the assumption of the corporation's liabilities. Thus, at the time of purchase, appellant was in a position to make the requisite withholding by paying the \$10,000 to BOE directly, or reducing the liabilities it assumed and using the available funds to pay BOE. That years later, appellant made every effort to pay the BOE but was prevented from doing so, does not demonstrate that it was "impossible" for appellant to withhold from the consideration it rendered to the corporation for the business, particularly where appellant had ample opportunity to do so beforehand. To hold otherwise would permit taxpayers to circumvent successor liability merely by attempting to withhold at a time when circumstances prevented them from doing so, instead of at the time of purchase as required by R&TC section 6811.

While I greatly sympathize with appellant's situation, it was one of appellant's own making. Appellant could have protected itself by obtaining a tax clearance certificate, or by fulfilling its contractual obligation to pay BOE in a timely fashion. And, if a purchaser fails to take the necessary steps to protect itself, there is "no just cause to complain if it is thereafter determined by the [BOE] that the seller has failed to pay the sales tax due to the state and his statutory liability as purchaser is enforced." (*People v. Buckles* (1943) 57 Cal.App.2d 76, 81.)

For all the above reasons, I would find that no adjustments are warranted to appellant's successor liability.

DocuSigned by:

4D465973E644489...

Nguyen Dang
Administrative Law Judge