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2019 – OTA – 221
Nonprecedential

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeals of:	) OTA Case No. 18011885, 18012023, 18012030, 18011886
STEVEN MATTHEW BRASLAW AND YOGINEE PATEL BRASLAW	) CDTFA Case ID: 728044, 846815, 970547, 995791
dba **PIZZA TIME and RELISH**	) CDTFA Acct. No. 100-775728
	) Date Issued: August 16, 2019

OPINION

Representing the Parties:

For Appellants: Steven P. Byrne, Attorney
Karen C. James, Attorney

For Respondent: Joseph Boniwell, Attorney

A. KWEE, Administrative Law Judge: Pursuant to the State Board of Equalization's (board's) Rules for Tax Appeals,[1] Steven and Yoginee Braslaw, a husband and wife partnership,[2] appeal a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on an untimely petition for redetermination (which the board accepted as a late protest) of a January 30, 2012, Notice of Determination (NOD) (OTA case 18011885). The NOD assessed tax of $223,347.65, a negligence penalty of $22,347.65, plus accrued interest, for the period October 1, 2008, through September 30, 2011. This liability is final and was the

[1] There is no provision in the Revenue and Taxation Code (R&TC) which specifically required or authorized the board to accept an untimely petition of a final sales tax liability. Under regulations promulgated by the board and applicable at the time the appeal was filed with the board, if a petition for redetermination is filed after the 30-day time period authorized in R&TC section 6561 to file a petition, the board gave itself discretion to accept the appeal as an administrative (late) protest of a final liability. (Cal. Code Regs, tit. 18, § 5220.) The Office of Tax Appeals (OTA) is the successor to the board, and is vested with all the duties, powers, and responsibilities of the board necessary or appropriate to conduct sales and use tax appeals. (Gov. Code, § 15672(a).)

[2] Steven and Yoginee Braslaw reported the business as a husband and wife co-ownership to CDTFA. Under certain circumstances, a partnership for income tax purposes does not include a qualified joint venture conducted by a husband and wife who file a joint income tax return (more commonly referred to as a husband and wife co-ownership). (See Int. Rev. Code, § 761(f).) For sales and use tax purposes, irrespective of income tax treatment, both a "partnership" and a "joint venture" are considered a separate person. (R&TC, § 6015.) For ease of analysis, we refer to Steven Braslaw as appellant-husband, Yoginee Braslaw as appellant-wife, and to them collectively as the appellants.

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subject of collection actions by CDTFA. In two related matters, and during the course of the appeal with CDTFA, appellants filed claims for refund in the amount of $18,981.90 and $5,791.00, respectively, for lien and levy payments, and intercepted tax refunds, that CDTFA collected from appellants (OTA case numbers 18012023 & 18012030).

In a separate consolidated matter, pursuant to R&TC section 6561, appellants timely appeal CDTFA's decision on a petition for redetermination of a NOD dated March 13, 2013, for $20,301.75 in tax, a failure-to-file penalty of $2,030.18, plus accrued interest (OTA case number 18011886), for the period October 1, 2011, through December 31, 2011. These matters are being decided based on the written record because appellants waived the right to an oral hearing.

ISSUES

1. Whether appellants are personally liable for the sales and use tax liabilities incurred under their seller's permit.
2. Whether appellants established that adjustments are warranted to the liability as determined.

FACTUAL FINDINGS[3]

1. On June 14, 2006, Lym, Inc. (California Corporation Number C2837223) was incorporated in California (Corporation A).
2. On June 30, 2006, "Stephen M. Braslaw and Yoginee P. Braslaw (Husband and Wife) d.b.a. Pizza Time" (appellants) signed a commercial lease agreement to operate a restaurant selling pizza in California on Van Buren Boulevard (pizzeria). The lease agreement called for monthly rent due of $4,473.
3. On July 7, 2006, appellants applied for a seller's permit for the pizzeria, with a reported start date of July 10, 2006. The seller's permit application reported that appellants were operating as a husband and wife co-ownership doing business as Pizza Time. On the application, appellants reported that they purchased this business from SEL Enterprises for $535,000. Appellants reported projected monthly taxable sales of $45,000. Both

[3] In the factual findings herein, we consider as evidence those documents contained in the written record. (Cal. Code Regs, tit. 18, §§ 30102(h), (w), 30404(a).) Appellants cite, as evidence, a number of exhibits that were allegedly submitted to CDTFA prior to their filing an appeal with the Office of Tax Appeals (OTA). OTA is a separate entity from CDTFA. OTA does not have access to CDTFA's records. The majority of the exhibits referenced were not submitted by either party to OTA, and as such are not considered evidence in this appeal.

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appellants signed the seller's permit application. Appellants provided their personal residence address as the mailing address for their business.

4. Appellants concede that on July 7, 2006, an "On-Sale Beer and Wine – Eating Place License" was issued to appellants, individually, by the California Department of Alcoholic Beverage Control.

5. On March 28, 2008, Savor Inc. (California Corporation Number C3080753) was incorporated in California (Corporation B). On August 11, 2008, Corporation B filed a Statement of Information. Corporation B reported that appellant-husband was CEO, and appellant wife was secretary and CFO. No other officers were reported. Corporation B also reported that it had three directors: both appellants, and Leela Patel.[4] Appellants' personal residence address was the contact address for each director, officer, and for the corporation.

6. On June 30, 2008, Corporation A filed an updated Statement of Information with the Secretary of State.[5] The updated statement reported that Corporation A had three officers and three directors. The three directors were the officers. The officers were appellant-husband (CEO), appellant-wife (Secretary), and Shardaben B. Patel (CFO). Appellants' personal residence address was provided as the contact address for each director/officer, and as the mailing address for the corporation. Corporation A's reported business address was the same as the address on the seller's permit and lease agreement.

7. On July 22, 2008, appellant-husband went in person to the board's Riverside District Office (CDTFA's Riverside Office),[6] and added a business dba Relish, located on University Avenue, as a sub-location on appellants' seller's permit (the deli).

8. On January 6, 2009, an unsigned and undated tax return was filed under appellants' seller's permit for the third quarter of 2008 (3Q08). The top of the return reflects that CDTFA had pre-addressed and mailed the blank return to appellants at their personal residence address, and the return had been prepared by hand and returned to CDTFA.

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[4] As relevant, appellant-wife's middle name is Patel.

[5] Information on the officers, shareholders, or directors of Corporation A, prior to this date, is not a part of the written record.

[6] CDTFA took over the certain functions of the board on July 1, 2017, including administration of the sales and use tax law. As part of this change, the Riverside Office was also transferred to CDTFA on July 1, 2017.

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9. On April 1, 2009, Corporation B filed an updated Statement of Information, and provided the University Avenue business address for the deli, which was a different location from the pizzeria, and deleted Leela Patel as a director of Corporation B. The other officer and director information remained the same as reported on March 28, 2008 (i.e., appellants were the sole reported officers and directors of the corporation).
10. On June 24, 2009, Corporation A filed a Statement of Information reporting no change to the information reported in the prior year's Statement of Information.
11. Appellants provided a copy of a "security interest agreement for the purchase and sale of business assets" (sales agreement), between Corporation A, and Casey and Kristel Thornbury (purchasers), dated July 23, 2010. The sales agreement sold certain assets of the pizzeria as identified in "Schedule A," leasehold interests, and goodwill, to the purchasers.[7] The sales agreement provided for a sales price of $200,000, with a monthly payment of $2,270.96 (which the sales agreement specified was calculated based on a 6.5% interest rate amortized over 10 years), with the first payment deferred until June 1, 2011. The sales agreement specified that if, prior to the due date of the first payment, the business generates $45,000 in monthly sales, the monthly payment is due on that month. The document was signed by both parties; however, the signatures are not legible, and no names were printed under the signature lines. Appellants also provided a single signature page, which was attached to the last page of the sales agreement. The signature page is dated July 15, 2010, and signed by Casey Thornbury and Kristel Thornbury, as borrowers. The signature page was not signed by appellants or by Corporation A. The remainder of the July 15, 2010 signature page was not provided, and aside from the names of the borrowers signing the page, there is nothing to connect this signature page with the sales agreement.[8]
12. On August 25, 2010, CDTFA issued a notice to appellant-husband, at his personal residence address in Riverside, California, notifying him that there was a self-assessed liability due under appellants' seller's permit, based on appellants having filed a non-remittance return for 2Q10.

[7] Schedule A is not a part of the record.

[8] Is clear there are missing pages because the top of the signature page contains terms and conditions and starts off in the middle of a sentence.

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13. On September 15, 2010, Corporation A paid appellants' self-assessed 2Q10 liability.

14. On February 8, 2011, CDTFA issued a Notice to Appear – Revocation Proceeding (NTA) addressed to appellant-husband, sent to his personal residence address in Riverside, California. The NTA notified appellant-husband that CDTFA would revoke his seller's permit unless he filed a tax return for 3Q10 and paid any balance owed. A tax return was later filed for 3Q10, reporting $6,152 in total sales, and $1,262 in taxable sales, for the pizzeria and the deli.

15. On January 13, 2012, a CDTFA inspector visited the pizzeria because CDTFA determined it was reporting extremely low sales. An employee at the pizzeria informed CDTFA that appellant-husband was evicted in July 2011 for failing to pay rent, and that Casey Thornbury was the owner and had been running the business for the last six months. The CDTFA inspector noted that the number of employees seemed high considering the total sales amounts reported.

16. During the period October 1, 2008, through June 30, 2011 (liability period), appellants reported to CDTFA, under their seller's permit, taxable sales of $118,017 for both locations: the pizzeria and the deli. This amount equals average monthly taxable sales of $3,576 (or average daily taxable sales of approximately $119.20) for both locations (i.e., average daily taxable sales of approximately $59.60 per location). For the period prior to July 1, 2010, appellants claimed no deductions or nontaxable transactions. For the portion of the liability period on and after July 1, 2010, through June 30, 2011, $53,513 in nontaxable transactions were claimed.

17. CDTFA determined that the reported sales were unreasonably low for two locations and the number of employees observed by CDTFA's inspector at the pizzeria, and began an audit of the business. On audit, appellants did not provide any books or records. Appellants provided a 2010 federal income tax return for Corporation A, and 2009 and 2010 federal income tax returns for Corporation B. Corporation A reported gross receipts of $130,943 on its 2010 federal income tax return. Corporation B reported gross receipts of $153,313, and $150,413, respectively, on its 2009 and 2010 federal income tax returns.

18. For the pizzeria, CDTFA disregarded the amounts reported on the 2010 federal income tax return for Corporation A, on the basis that the reported amounts were unreasonably low. CDTFA estimated the pizzeria made taxable sales of $183,441 per quarter, based on

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the average reported taxable sales of the prior owner (SEL Enterprises). For the deli, CDTFA accepted cost of goods sold reported on Corporation B's federal income tax returns. CDTFA applied a 200 percent markup to reported cost of goods sold on the federal income tax returns for 2009 and 2010. For 2011, CDTFA averaged cost of goods sold for the prior two years, and applied a 200 percent markup to this amount. Applying these numbers, CDTFA calculated an understated taxable measure of $2,888,492, for both locations, for the period October 1, 2008, through December 31, 2011 (4Q08 to 4Q11).

19. On audit, CDTFA determined that appellants underreported $2,888,492 for both locations during the period 4Q08 through 4Q11. CDTFA issued NODs to appellants on January 30, 2012, and March 13, 2013, respectively, for the above liability.

20. In a Decision and Recommendation (Decision) dated April 4, 2017, the board's Appeals Division (CDTFA)[9] recommended deleting the 3Q11 and 4Q11 liability for the pizzeria, on the basis that the business had been sold. Additionally, CDTFA recommended accepting gross receipts as reported by both corporations on their 2008, 2009, and 2010 state income tax returns, as applicable.[10] CDTFA's adjustments reduced the measure of tax on the first NOD from $2,626,534 to $1,433,560, and on the second NOD from $261,960 to $29,242, and reduced the negligence and failure-to-file penalties accordingly.

21. This timely appeal followed. On appeal, appellants contend that CDTFA billed the wrong persons, and that Corporation A and Corporation B, respectively, incurred the liabilities at issue. Appellants contend that they had no involvement in running the

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[9] The Appeals Division was renamed and transferred to CDTFA on July 1, 2017; however, it continued to advise and serve the board in the performance of the board's appeals functions through December 31, 2017, pursuant to a contract between the board and CDTFA. For ease of analysis we will refer to the Appeals Division as CDTFA.

[10] CDTFA contends that it obtained copies of the state income tax returns from the Franchise Tax Board. The state income tax returns are not a part of the written record. CDTFA contends that Corporation A reported gross receipts of $599,672 for 2008, $601,097 for 2009, and $130,943 for 2010. CDTFA determined that Corporation A's 2010 reporting only covered half the year, and pro-rated it accordingly to two quarters, based on its finding that appellants sold the business of the corporation in July 2010. CDTFA contends that Corporation B reported gross receipts of $16,281 for 2008, $153,313 for 2009, $150,413 for 2010, and $116,966 for 2011. CDTFA determined that Corporation B's 2008 reporting only covered half the year, and pro-rated it accordingly to two quarters, based on its finding that appellants began operations in July 2008. CDTFA pro-rated the gross receipts per state income tax returns quarterly for the remaining income tax returns filed by both corporations.

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business after January 2009, and that other people owned the corporations. Additionally, appellants contend the liability is overstated.

22. On May 31, 2018, appellants filed an amended 2009 state income tax return with the Franchise Tax Board (FTB) for Corporation A, reporting $71,114 in gross receipts (amending the $601,097 in gross receipts reported on the originally filed return). Based on the amendments, Corporation A claimed a refund from FTB.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) A "sale" includes any transfer of title or possession of tangible personal property for a consideration. (R&TC, § 6006(a).) The sales tax is imposed on the retailer, who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code, § 1651.1; Cal. Code. Regs., tit. 18, § 1700.)

A retailer includes every seller who makes retail sales of tangible personal property. (R&TC, § 6015(a).) A seller includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of sales tax. (R&TC, § 6014.) As relevant, for sales and use tax purposes, a person includes any individual, partnership, or corporation. (R&TC, § 6005.)

A permitholder who fails to surrender a seller's permit upon transfer of a business shall be liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or constructive knowledge that the transferee is using the permit in any manner. (R&TC, § 6071.1.) The predecessor's liability shall be limited to the quarter in which the business is transferred, and the three subsequent quarters. (R&TC, § 6071.1.) Liability does not attach on and after the date that the permitholder establishes that CDTFA was notified to cancel the permit. (*Ibid*.)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA 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. (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.* (D. Hawaii 2011) 816 F.Supp.2d 941, 950; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514;

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Appeal of Michael E. Myers (2001-SBE-001) 2001 WL 37126924.) 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 *Riley B's, Inc.*, *supra*, at p. 616; see also *Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.)

The issue on appeal is whether appellants incurred any sales and use tax liabilities. Resolution of this issue requires addressing a factual dispute as to the true ownership of the pizzeria and the deli businesses. It is undisputed that someone owned and operated these businesses and the assets of these businesses, and that such person was a retailer and required to hold a seller's permit. (See R&TC, § 6066(a).) CDTFA contends that appellants were the true owners of both businesses, and that is why it issued the NODs to appellants for the sales and use tax liabilities incurred by operation of these businesses. Appellants contend that the businesses were owned and operated by Corporations A and B, respectively, that they had completely divested themselves of any involvement in the pizzeria, and that the corporations incurred the liabilities. CDTFA did not issue an NOD to either corporation and, as such, the sales and use tax liability of either corporation, if any, is not at issue in this appeal.

<u>The Pizzeria</u>

Appellants applied for and signed the application for seller's permit, and were reportedly doing business as a husband and wife co-ownership of the pizzeria business. (*Ante*, fn. 2.) Additionally, appellants concede that the pizzeria's liquor license was issued to them, individually, as opposed to Corporation A. Furthermore, appellants signed the lease agreement as "Husband and Wife" doing business as the pizzeria. During the course of the liability period, CDTFA mailed sales and use tax returns to appellants in their own name, at their personal residence address, and at least some of these returns were filled out and returned to CDTFA. CDTFA also sent an August 25, 2010 notice to appellants' personal residence address, for an unpaid self-assessed liability for their business, and this liability was shortly thereafter paid.

In summary, the evidence shows that appellants represented to CDTFA, and to others, that they were the true owners of the pizzeria. As such, we conclude that it was both reasonable and rational for CDTFA to issue an NOD to appellants for the sales and use tax liabilities incurred by the business that they represented to CDTFA was their own business, and which

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appellants personally added to their seller's permit. Under these facts, the burden is on appellants to prove error in CDTFA's determination that appellants incurred the liabilities at issue.

Appellants contend error in the NOD on the basis that they transferred the pizzeria business to Corporation A, and notified CDTFA of the transfer. To the extent appellants could prove that the business was formally (legally) and fully transferred to Corporation A, R&TC section 6071.1 would limit appellants' liability, as a predecessor, to the date in which appellants established that they transferred the business to Corporation A, plus three subsequent quarters, unless the transfer documents showed that, after the transfer, 80 percent or more of the real or ultimate ownership of the business was held by appellants. (R&TC, § 6071.1(a), (b).) Corporation A's checks indicated that it was also doing business as Pizza Time. Additionally, Corporation A made at least one sales and use tax payment (for 2Q10) to CDTFA, and made at least one payment directly to appellant-wife, which tends to indicate that Corporation A had some involvement with both appellants and the pizzeria. Nevertheless, at least some of the business assets were still owned directly by appellants; namely, the liquor license and the lease for the business premises. Thus, based on the evidence available, even if appellants transferred some assets or operational aspects of the pizzeria to Corporation A, it cannot be said that appellants legally transferred all of the assets of the business to Corporation A.

Appellants contend that they notified CDTFA on several occasions of the alleged transfer of the pizzeria to Corporation A, and, as such, are not responsible for liabilities incurred after the date CDTFA was notified. In support, appellants submitted letters addressed to CDTFA's Riverside Office, dated January 31, 2006, and July 24, 2006, respectively. Both letters are signed by appellant-husband. At the top of the letters, appellants' seller's permit number is identified as "SR X EH 100775728." In one letter, dated July 24, 2006, appellant-husband notifies CDTFA of the transfer of the business to Corporation A, and requests that the seller's permit be transferred to Corporation A. In the other letter, dated January 31, 2006, appellant-husband summarizes a phone call with an unidentified employee of CDTFA, in which he writes: "When I called to inquiry [*sic*] why [the seller's permit] only listed my name, I was informed that they list the President only." In this letter, appellant goes on to request that the permit be corrected to list Corporation A as the account owner. CDTFA contends that it has no record of receiving these letters, and that the statement attributed to CDTFA in the second letter is not

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accurate and illogical, and that CDTFA would have taken action to correct the issue if it received either of these letters.

We resolve this factual inconsistency in CDTFA's favor, because the documentary evidence contradicts appellants' allegations. According to appellants' application for seller's permit, dated July 7, 2006, CDTFA issued to appellants a single location seller's permit for the pizzeria, and the permit number was: SR EH 100775728.[11] It is undisputed that appellants did not add a second selling location to this permit until two years later, on July 22, 2008, at which time CDTFA added the modifier X to the seller's permit number. [12] Both of the alleged "notification" letters that appellants submitted contain a seller's permit number with the X modifier in it, but are dated in 2006, which is *before* the X was added to the seller's permit number. In other words, the seller's permit number that appellants used to identify their account on the "notification" letters that were allegedly mailed to CDTFA in 2006, did not even exist until 2008. Furthermore, although one of the letters to CDTFA purports to report a change to the seller's permit, the letter is dated January 31, 2006, which is six months *before* appellants even applied for that seller's permit on July 7, 2006. This leads us to believe that appellants did not notify CDTFA of the alleged transfer in 2006 or at any time prior to the audit, and that appellants did not mail either of these letters to CDTFA's Riverside Office, or have the phone conversation conveniently summarized in the letter dated "January 31, 2006." As such, we conclude that appellants are not credible, and we disregard as unreliable three additional "notification" letters that appellants allegedly mailed to CDTFA.[13]

Appellants contend a legal transferred occurred, and their liability terminated, prior to July 10, 2010. Given the lack of credible evidence in the record on the alleged transfer, the nature of such evidence only appellants would be able to provide, one could only speculate as to the relationship between appellants and Corporation A.[14] Therefore, we find that appellants

[11] As relevant, appellants left the space to add additional selling locations blank on the application.

[12] The designation SR, by itself, means there is only one selling location (EH refers to the location: Riverside). (CDTFA Compliance Policy and Procedures Manual (CPPM), § 240.010.) The modifier X, in a seller's permit number, means that the seller's permit is a consolidated account with more than one business location. (CPPM, §§ 230.030, 240.010 "SR X Consolidated Accounts.")

[13] Appellant provided similar "notification letters," which CDTFA contends it has no record of receiving; two are dated March 1, 2011, and one is dated March 22, 2011.

[14] We note here that none of the originally filed income tax returns are a part of the record. The only return information available is the data transcribed by CDTFA, which is the reported income figures.

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failed to establish that, because of an alleged transfer to an unrelated entity, their liability terminated prior to the date as determined by CDTFA. Instead, we agree with CDTFA that there is sufficient evidence to conclude that appellants continued, in some manner, to own assets of and operate aspects of the pizzeria at a minimum through the July 23, 2010, date determined by CDTFA, or longer. Consistent with this finding, we note appellant-husband appeared in-person to add an additional selling location to the seller's permit, reportedly a husband and wife co-ownership, on July 22, 2008, which further evidences that, at this time, it was appellants, and not Corporation A, who owned the pizzeria. Furthermore, when CDTFA visited the pizzeria in January 2012, an employee reportedly informed CDTFA that appellant-husband continued to operate the business until six months prior to the visit, at which time appellant-husband was evicted for failing to pay rent in July 2011 (which is nearly one year after the July 23, 2010, date determined by CDTFA).[15]

Considering the above evidence it is entirely plausible to conclude, for example, that appellants incurred the liability because: the corporation was involved in operation of the pizzeria, or owned or operated it in whole or in part, as an agent of appellants;[16] notwithstanding any involvement by the corporation, appellants continued to own all or substantially all of the assets of the pizzeria; or, if there was a transfer of all or substantially all the assets of the pizzeria business to Corporation A, it did not occur until July 2010 or July 2011. In any event, it is not necessary for us to reach a speculative conclusion as to what might have happened or

[15] Pursuant to R&TC section 6071.1, CDTFA held appellants liable for the quarter in CDTFA determined the business was transferred (3Q10), plus three additional quarters.

[16] An agent is one who represents another, called the principal, in dealings with third persons. (Civ. Code, § 2295.)

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when.[17] The burden of establishing error with CDTFA's determination is on appellants. Although appellants contend that they notified CDTFA of an alleged transfer prior to July 23, 2010, they failed to provide credible evidence to support this contention. As such, we conclude that appellants failed to establish that their responsibility for the liabilities incurred under their seller's permit for the operation of the pizzeria terminated prior to the date determined by CDTFA.

The Deli

Appellants applied for and signed the application for the underlying seller's permit as a husband and wife co-ownership, and thereafter added the deli to their seller's permit on July 22, 2008. Returns were filed under appellants' seller's permit, and CDTFA billed appellants for the underreporting on the permit, as determined by CDTFA. The only return in the record is unsigned, but it covers both selling locations (the pizzeria and the deli). Although the return is unsigned, the address label reflects that CDTFA had mailed the return to appellants' personal residence address, it was returned to CDTFA, and appellants' personal residence address was the mailing address for their business as they reported it on their application for seller's permit. CDTFA thereafter issued the NOD to appellants for liabilities incurred by operation of the deli, because, as summarized above, appellants had added the deli to their seller's permit, at least some of the returns that CDTFA mailed to appellants' personal residence address were filed under the seller's permit in appellants' name, and CDTFA was not notified, prior to the audit, that any other person might have incurred the liabilities. Therefore, as with the pizzeria, we conclude it was reasonable and rational for CDTFA to issue the NOD to appellants,

[17] As relevant, CDTFA has posited several theories in this regard. As indicated by the concurrence, CDTFA first contends that appellants' "evidence is sufficient to support [appellants'] claim that it was [Corporation A], rather than [appellants], who owned and operated [the pizzeria]." Nevertheless, CDTFA also contends that appellants "provided no documentary evidence showing any transfer of [the pizzeria] from [appellants] to [Corporation A]. We believe the reason for this is clear: there was no formal transfer." CDTFA separately contends that appellants "clearly retained a direct interest in the business of [the pizzeria] through the time of its closing, as confirmed by the lease termination agreement the [appellants] entered into in May 2011: 'The Lessees [appellants] have operated a restaurant known as "Pizza Time" since the inception of the lease ....' We conclude that the evidence shows that [appellants] did not cut off all their interest in the operation of [the pizzeria.]" CDTFA goes on to contend that appellants, and not Corporation A, held various assets of the pizzeria, such as the lease and the liquor license, and that appellants did not divest themselves of involvement in the businesses. In summary, we understand that CDTFA does not dispute that Corporation A owned and operated certain aspects of the pizzeria. Nevertheless, CDTFA also contends that appellants owned assets of the pizzeria and were involved in operationof the pizzeria. Whatever the case may be, considering that CDTFA contends appellants are liable for the taxes at issue, it is at least clear that the parties do dispute, at all relevant time periods, both (1) the true ownership ofthe pizzeria and; (2) appellants' involvement, if any, in operating the pizzeria.

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and the burden is on appellants to prove error in CDTFA's determination that appellants incurred the liabilities at issue. In this respect, appellants have only provided, to OTA, the statements of information filed with the Secretary of State for Corporation B. Appellants provided no other contemporaneous documentary evidence to OTA relevant to the ownership issue, such as evidence to show that appellants transferred the assets of the deli to Corporation B, and, if so, the date of the transfer. As such, we conclude appellants failed to establish error in CDTFA's determination that appellants incurred the liabilities at issue by their operation of the deli.

The Liability

As relevant here, CDTFA's Decision accepted the gross receipts reported on the corporations' 2008, 2009, and 2010 state income tax returns, as the gross receipts attributable to appellants' operation of the pizzeria and deli. After CDTFA issued its Decision, on May 31, 2018, appellants filed an amended 2009 state income tax return with FTB for Corporation A. The amended return reduces Corporation A's gross receipts as originally reported, by $529,983, and claims a refund for the overpayment.

Appellants contend that, because CDTFA's Decision accepted the gross receipts of Corporation A as originally reported on the 2009 state income tax return, CDTFA must now accept the gross receipts as "amended" during the course of this appeal. In support, appellants submitted a handwritten 21-page document, which appellants allege is the pizzeria's Daily Sales Report. The document covers the period October 1, 2008, through June 30, 2010, and includes daily totals, with no further breakdown. Appellants also submitted a declaration from Bhikhabhai Patel, who was allegedly an officer of Lym, Inc., signed under penalty of perjury, declaring that this is a true and correct copy of the pizzeria's daily sales notebook, and conceding that additional business records are no longer available.

Here, appellants' daily sales journal reflects $121,956 in total sales by the pizzeria for the three-year period October 1, 2008, through June 30, 2010. Corporation A's amended return reports $71,114 in gross receipts for 2009. If we were to accept this figure as correct, that would mean the pizzeria had a combined total sales amount of $50,842 for 2008 and 2010 (i.e., $121,956 - $71,114). This amount, $50,842, of gross receipts for two years is unreasonable considering it is less than the rent due for the pizzeria of $53,676 per year. Furthermore, Corporation A's originally filed returns for 2008 and 2010, which have not been amended, reported $599,672 for 2008, and $130,943 for 2010, for a combined total of $730,615, which far

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exceeds $50,842. Thus, the sales journal and amended return for 2010 directly conflict with the other evidence in the record, and both cannot be correct. Considering that we have already found appellants to be less than credible, we give little weight to the declaration signed under penalty of perjury, stating that the handwritten daily sales document accurately reflects the pizzeria's total sales, or to the amounts reported in Corporation A's amended return for 2010.

In ascertaining the weight to afford appellants' evidence, we take into consideration the fact that the amended return was filed by a dissolved corporation, and that FTB is barred by statute from granting the claimed refund. (R&TC, § 19306.) Additionally, at the time of applying for their seller's permit, appellants reported projected monthly taxable sales of $45,000, which equates to annual taxable sales of $540,000, and we find this figure more consistent with the originally filed income tax returns and the liability as determined by CDTFA, than with appellants' evidence. Furthermore, the prior owner of the pizzeria reported average quarterly sales of $183,441, which exceeds the audited average quarterly sales as determined by CDTFA in its Decision. Finally, the July 23, 2010 sales agreement included a trigger that repayment would start upon the business receiving $45,000 in monthly sales, and it is unlikely appellants or the person selling the assets of the pizzeria would have included such a figure in the sales agreement if they did not believe the pizzeria would make $45,000 in monthly taxable sales. To that end, the sales agreement called for a monthly payment of $2,270.96. If we accepted appellant's contention that the pizzeria was making total sales of $71,114, after subtracting the monthly payment, the pizzeria would have remaining receipts of approximately $120.17 per day. We find this figure unreasonably low, and the business would not be able to cover monthly rent of $4,473, utilities, overhead, employee salaries, and food, if it only made $120.17 per day. In absence of any credible evidence, we find that appellants failed to establish error in CDTFA's determination of the pizzeria's liability.

With respect to the deli, appellants did not provide evidence to show error in CDTFA's determination of the deli's liability and, therefore, we have no basis to find error. As such, we conclude that appellants failed to establish a basis for any further adjustment to the liability as determined by CDTFA.[18]

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[18] Based on our conclusion that no further adjustments are warranted, we do not discuss the substantive merits of the refund claims.

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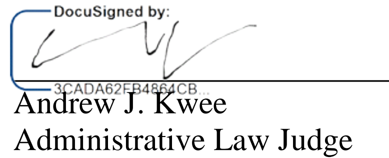
HOLDINGS

1. Appellants are personally liable for the sales and use tax liabilities incurred under their seller's permit.
2. Appellants failed to establish that any adjustments are warranted to the liability as determined by CDTFA.

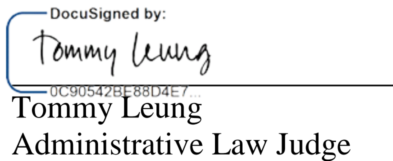
DISPOSITION

We sustain all of CDTFA's actions on the NOD. The liability shall be redetermined in accordance with CDTFA's Decision, and the claims for refund are denied.



Andrew J. Kwee
Administrative Law Judge

I concur:



Tommy Leung
Administrative Law Judge

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D. CHO, Concurring:

I concur with the majority opinion's holdings; however, I do not join in the analysis for Issue 1. While I completely understand the majority's position that the record before us does not include sufficient evidence to establish that appellants transferred the ownership and operation of the pizzeria and deli to Corporations A and B, respectively; it is my understanding that CDTFA has conceded this fact. According to the April 4, 2017 Decision, the Appeals Bureau stated, "[w]e find that the evidence is sufficient to support [appellants'] claim that it was [Corporation A], rather than [appellants], who owned and operated Pizza Time." The Decision also concluded that the deli was owned and operated by Corporation B. Because CDTFA and appellants both agree that the true owner/operator of the businesses were the corporations and not appellants, I do not believe that we can come to a different conclusion based on the lack of evidence presented before us. Nonetheless, I believe that the majority opinion reached the correct result as to the liability.

R&TC section 6071.1(a) provides that a permitholder who fails to surrender a seller's permit upon transfer of a business shall be liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or constructive knowledge that the transferee is using the permit in any manner. California Code of Regulations, title 18, section (Regulation or Reg.) 1699(f)(2) specifies that the predecessor will be held liable for any taxes, interest, and penalties through the date on which CDTFA is notified to cancel the permit. The predecessor has the burden of establishing that CDTFA received notice to cancel the permit. (*Ibid.*) Furthermore, it will be presumed actual notice was not received by CDTFA unless CDTFA's records reflect that CDTFA received clear notice of the cessation or transfer of the business for which the permit was held. (Reg. 1699(f)(2)(B).)

Where the predecessor does not establish that CDTFA received actual notice of the transfer of the business, the liability shall be limited to the quarter in which the business was transferred plus the three subsequent quarters. (Reg. 1699(f)(3).) However, this limitation shall not apply where 80 percent or more of the real or ultimate ownership of the business is held by the predecessor after the transfer of the business. (*Ibid.*)

Here, there is no dispute that the businesses transferred from appellants to the corporations. Although appellants argue that they provided notice to CDTFA of these transfers, there is no dispute that CDTFA's records do not indicate that CDTFA received clear notice of

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the transfers of the businesses. Therefore, it is presumed that CDTFA did not receive notice of these transfers for predecessor liability purposes, and appellants' evidence, even if true, does not overcome this presumption.

Because appellants did not provide actual notice of the transfers of the businesses, appellants are liable for the continued use of their seller's permit by the transferee for the quarter in which the transfer occurred and the three subsequent quarters. Although neither party is able to establish when the transfers of the businesses to the corporations occurred, in this particular situation, this fact is immaterial because appellants transferred both businesses to corporations that appellants ultimately owned or had complete control over. As a result, the limitation to predecessor liability contained in R&TC section 6071.1 and Regulation 1699(f)(3) does not apply. (See Reg. 1699(f)(3).) Accordingly, appellants remained liable for the taxes, interest, and penalties incurred by the transferee until the businesses were transferred to an entity in which appellants did not have ownership control, subject to the provisions contained in R&TC section 6071.1 and Regulation 1699(f)(3).

Although appellants allege that they sold their shares of Corporation A to the remaining shareholders in 2009 and thereafter had nothing to do with the pizzeria business, appellants have failed to establish this assertion by a preponderance of evidence because there appears to be contradictory evidence in the record. For example, appellant signed a letter dated March 1, 2011, as president of Corporation A, which would directly contradict appellants' statement that they had nothing to do with Corporation after 2009. In addition, as CDTFA pointed out, appellants remained on the lease with the landlord of the real property where the pizzeria was operating, and appellants have not provided an explanation why they would remain personally liable for a business that they no longer had any interest in. Therefore, I believe that appellants failed to meet their burden of proof establishing that they truly divested their ownership of the business in 2009.

Finally, appellants and CDTFA agreed that the pizzeria was transferred in July 2010, and CDTFA stated that it did not receive actual notice of this transfer. As a result, appellants continued to be liable for the use of their seller's permit by the subsequent entity, just as they had been when they transferred the businesses to the corporations. (See R&TC, § 6071.1; Reg. 1699(f)(3).) However, this time, it is undisputed that appellants did not have an 80 percent or more ownership interest in the transferee. As a result, the limitation period in R&TC section

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6071.1 and Regulation 1699(f)(3) applied to the July 2010 transfer of the business. Accordingly, appellants' liability was limited to the quarter in which the transfer occurred and the three subsequent quarters. With respect to appellants' arguments and contentions for events taking place after July 2010, these arguments do not have any bearing on whether CDTFA received actual notice of the July 2010 transfer or whether there is any other legal theory in which to limit appellants' predecessor liability. Therefore, appellants have not established that any further adjustments are warranted to the liability.

With respect to the deli, appellants have not alleged when they lost their ownership interest in Corporation B. As a result, appellants remained liable for the taxes, interest, and penalties incurred by Corporation B using appellants' seller's permit number under a predecessor liability theory for the entire liability period. (See R&TC, § 6071.1.)

Based on the foregoing, I concur in the majority's holding that appellants are liable for the taxes, interest, and penalties at issue in these appeals but on a different theory of liability.

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Daniel K. Cho
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Daniel K. Cho
Administrative Law Judge