OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011891
	) CDTFA Case ID 869819
TODD A. WELKER	) CDTFA Account No. 102-097975
	)
	) Date Issued: August 13, 2019
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Jesse W. McClellan, Esq. Lucian Kahn, Esq.
For Respondent:	Joseph Boniwell, Tax Counsel Monica Silva, Tax Counsel IV

M. GEARY, Administrative Law Judge: On March 5, 2019, we issued an Opinion in which we sustained an action by respondent California Department of Tax and Fee Administration (Department), or by its predecessor, the Board of Equalization (Board), determining appellant is liable as a successor for the unpaid liabilities of Beverly Bagels, Inc. (BBI) for the period April 1, 2005, through July 10, 2011, pursuant to R&TC sections 6811 and following. Appellant timely petitioned for rehearing of this matter. The Department opposedthe petition. Having now considered the parties' positions, we conclude that appellant has not established good cause for a new hearing.

The grounds for rehearing are essentially those that the courts have relied upon for years to grant a motion for a new trial pursuant to Code of Civil Procedures section 657. (*Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.) They are enumerated in the Rules for Tax Appeals at California Code of Regulations, title 18, section (Regulation) 30604, which states:

> A rehearing may be granted where one of the following grounds for a rehearing exists and materially affects the substantial rights of the party seeking a rehearing:

> (a) an irregularity in the appeal proceedings which occurred prior to issuance of the written opinion and prevented fair consideration of the appeal;
>
> (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented;
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> (c) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to issuance of the written opinion;
>
> (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or
>
> (e) an error in law.

(See also *Appeal of Do* 2018- OTA-002P.)

Appellant bases his petition on three of the five grounds stated above. He relies on Regulation 30604(c) and asserts there is newly-discovered evidence. He also relies on Regulation 30604(d) and (e) and contends that (1) the Opinion fails to apply controlling legal principles to identify the purchaser of the business; (2) the OTA panel of judges (Panel) incorrectly applied the formal rules of evidence, failing to consider hearsay evidence; and (3) the Opinion misrepresents or fails to consider relevant evidence, and reaches conclusions without citation to controlling authority, all constituting acts or omissions contrary to law or errors in law. We will address the contentions in the order presented.

Newly Discovered Evidence

A claim of newly discovered evidence is generally regarded with distrust and disfavor; but such evidence may be deemed sufficient to warrant a new hearing if it is not primarily cumulative, would probably lead to a different result, and could not have been provided before issuance of the Opinion. (See *Ulwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96, 127-128.)

In support of this argument, appellant provided a statement that appears to bear the signature of Leonard Jacob Rosenberg, the former owner of BBI.[1] According to the statement, Mr. Rosenberg discussed the sale of the business with appellant in June 2011; appellant indicated that he would be creating a limited liability company (LLC) for the specific purpose of

[1] In addition to appellant's 27 hearing exhibits, appellant has offered in support of his petition a copy of the hearing transcript (exhibit 28) and Mr. Rosenberg's statement (exhibit 29). While appellant refers to the Rosenberg statement as a declaration, it is not. (Code Civ. Proc., §2015.5.)

purchasing and operating the business; and BBI sold the business to the LLC, not to appellant. Although appellant is not clear about his contention, it appears that he argues either that the statement constitutes newly discovered evidence that warrants a rehearing, or that the newly discovered evidence will be testimony by Mr. Rosenberg.

The hearing in this appeal was on December 11, 2018. Mr. Rosenberg was not called as a witness, either in person or through a sworn declaration. The statement of Mr. Rosenberg, upon which appellant now relies, is dated March 21, 2019. It is not newly discovered, though it probably is newly created. It is a written statement apparently obtained by appellant from a person who could have been called to testify as a witness at the hearing. Furthermore, if Mr. Rosenberg had testified at the hearing to the matters stated now, his testimony, at least as evidenced by this written statement, would not have changed the result. It is undisputed that appellant discussed purchasing the business through an LLC and that, ultimately, the LLC was assigned appellant's rights under the purchase agreement. Mr. Rosenberg's testimony that BBI sold the business to the LLC would have been cumulative, in that appellant and the escrow officer gave similar testimony. In addition, such testimony constitutes a legal conclusion not binding on the Panel, which would have given it little, if any, weight. We find that appellant's argument that Mr. Rosenberg's written statement constitutes, or establishes the existence of, newly discovered, relevant evidence, which appellant could not have reasonably discovered and provided prior to issuance of the written Opinion is entirely without merit.

Insufficient Evidence[2]

We cannot grant a new hearing on the grounds of insufficient evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that we clearly should have reached a different decision. (Code Civ. Proc., § 657.)

The following facts are undisputed or find ample support in the record. On July 1, 2011, BBI accepted an offer by appellant to buy the café, individually or through "his wholly-owned affiliate," for $225,000 down and an additional $485,000 in installments. That offer, acceptance, and consideration (the mutual promises) created a contract (the Contract) between appellant and BBI. The escrow was set up by BBI and appellant to ensure the timely and proper performance

[2] In addition to the argument based on newly discovered evidence, the petition makes several other arguments citing to Regulation 30604(d) and (e). We will try, below, to separate our analyses, first discussing the alleged insufficiency of the evidence, and then discussing other claimed errors in law.

of their respective obligations under the Contract. Modification of the Contract and escrow instructions required the mutual written consent of appellant and BBI.[3] By July 6, 2011, appellant had deposited $225,000 into the escrow and executed the promissory note and security agreement, purportedly on behalf of the nonexistent LLC, for the remainder of the purchase price. The LLC came into existence on July 7, 2011, the same day that appellant, purportedly on behalf of the LLC, instructed the escrow officer to disburse all funds to BBI on July 11, 2011. The escrow officer disbursed the funds to BBI on July 11, 2011, the same day that appellant (or the LLC) took possession of and began to operate the café. As of this date, the LLC was not a party to the Contract or the escrow and it did not become a party to the escrow until July 12, 2011, when appellant assigned his rights to the LLC.

Appellant's argument that the Opinion fails to apply controlling legal principles to identify the purchaser of the business is rooted in his mistaken belief that we must apply all the rules for interpretation and enforcement of a contract to determine whether he, as opposed to the LLC, was the purchaser of the business for the purpose determining successor liability. In essence, appellant argues that the evidence established that, at all relevant times, the contracting parties intended that the LLC would purchase the business, the escrow holder was aware of that intent, and that the LLC did, in fact, purchase the business. Appellant's argument might have been appropriate in a lawsuit between the contracting parties for breach or enforcement of the Contract,[4] but we did not adjudicate the rights or obligations of the contracting parties between or among themselves. Our role was to determine whether appellant was a purchaser "who, through the handling of the purchase price or the form thereof, was in a position to protect the state's interest in collecting taxes which were due and owing." (*Knudsen Dairy Products Co. v. State Bd. of Equalization* (1970) 12 Cal.App.3d 47, 53.) In that role, we examined the evidence and the chronology of events fairly and objectively and were not required to give any particular weight to evidence of the contracting parties' intent. Appellant's intent to have the LLC

[3] The escrow agreement contained the following language: "No notice, demand, instruction, amendment, supplement, or modification of these escrow instructions shall be of any force or effect until mutually executed by all parties and delivered to the Escrow Holder. Any purported oral instructions, amendment, supplement, modification, notice or demand deposited with escrow holder by the parties or any of them shall be ineffective and invalid."

[4] According to the evidence, appellant instituted and eventually settled such a lawsuit.

purchase the business and the escrow officer's understanding of that intent, did not change the operative facts.

Based on facts established by the evidence, we concluded that appellant was the only purchaser who was a party to the Contract and the escrow, and the only one "in a position to protect the state's interest in collecting taxes which were due and owing" on July 7, 2011, when he authorized the escrow holder to disburse the funds to BBI in violation of Revenue and Taxation Code section 6812. That is the moment at which liability attached to him. When appellant gave that instruction, and when the escrow holder disbursed the funds on July 11, 2011, the LLC was not a party to the escrow and, therefore, it had no authority to give such an instruction. The fact that appellant purported to sign the instruction on behalf of the LLC is immaterial. We find that there is ample evidence to support our decision and that our findings, conclusions, holding, and disposition are legally correct.

Error in Law

We have already addressed, above, appellant's argument that the Opinion fails to give appropriate weight to the testimony and other evidence about appellant's intent to purchase the business through the LLC, and its argument that there is insufficient evidence to justify our Opinion. Here, we will discuss appellant's other arguments.

Appellant argues that the Contract was ambiguous in that it did not specifically identify the purchaser, and he points to the Department's questionable ownership investigation and argues that the Panel committed reversible error by not allowing and giving proper weight to evidence showing that the LLC purchased the café. First, the fact that the Contract allowed appellant to purchase the business as a sole proprietor or through an LLC did not render the Contract ambiguous. We required no extrinsic evidence to determine who was the purchaser for the purpose of determining successor liability. Nevertheless, we admitted all evidence that appellant asked us to admit. Appellant and the escrow officer testified to these matters, and the Panel considered that evidence.

Appellant also argued that the Panel improperly excluded hearsay evidence. He does not point to a single specific instance when this occurred, and it did not occur. We find only one relevant reference to "hearsay," and that occurs in the Opinion when we are discussing the escrow officer's testimony that she was told on July 7, 2011, that the LLC should be substituted as the buyer. The Opinion notes that the statement to the escrow officer was hearsay and that we

had no evidence that there was a modification to the Contract before July 12, 2011.[5] The statement in the Opinion is based on the fact that modification of the Contract (or the escrow) required mutual written consent. Thus, the statement by appellant on July 7, 2011, would only be relevant to prove his intent and it was, therefore, hearsay. Regardless, we did not exclude the evidence. The Panel is allowed to use the California rules of evidence when determining the weight to be given to evidence (Regulation 30214(e)(4)), and we gave all evidence the weight to which it was entitled.

Finally, appellant argues that the Opinion misrepresents relevant evidence, fails to consider relevant evidence and reaches conclusions without analysis or appropriate citation to legal authority. He argues that the Findings of Fact in the Opinion are inconsistent with the evidence, omit relevant evidence and contain statements of rules and conclusions without analysis or citation to applicable law. Appellant's objection that we incorrectly found that the audit of BBI occurred before the sale at issue is baseless. We found that the audit occurred after the sale. Appellant implies the evidence showed that he had been informed by BBI that it had no tax liability and that all assets would be transferred unencumbered, and he argues that the Opinion "makes appellant out to be a bad actor." The Opinion accurately describes the evidence and clearly states the Panel's findings based on the evidence. For example, it describes the $120,542.87 unpaid tax liability of the entity that sold the café to BBI; and it notes the original escrow instructions' reference to a $120,000 Board lien of record at the time of the sale and the steps taken by appellant to ensure that his LLC would be protected in the event that lien was not paid by BBI or its predecessor. It also accurately describes several instances when appellant was cautioned by the escrow officer of the risks of proceeding without a tax clearance. The Opinion does not characterize appellant as a bad person or someone with evil motive or intent.

Appellant also argues that many of the Findings of Fact ignore evidence to the contrary. There is no requirement that OTA's opinions describe all evidence. For example, appellant takes issue with our Finding of Fact 7, which states, "Also on July 1, 2011, the parties to the Contract opened an escrow to better ensure the timely and proper performance of their respective obligations under the Contract. Escrow documents identify BBI as the seller and appellant as buyer and set an August 30, 2011 escrow closing date." Appellant objects to the finding on the

[5] By July 11, 2011, appellant had essentially completed the purchase and, more importantly, he had released the funds to BBI.

grounds that "it fails to recognize Ms. Hile's testimony, where she stated she knew that the LLC was the purchaser and Appellant's name was being used only as a placeholder, until the LLC articles of formation were issued by the Secretary of State …." and appellant's own testimony he intended to have the LLC purchase the business. Appellant remains committed to his mistaken belief that his intent and the escrow officer's knowledge changed the legal effect of the Contract and escrow instructions. The documents clearly indicate otherwise, and the evidence shows that, when appellant instructed the escrow officer to release the funds, and when the escrow officer released the funds, appellant was the purchaser. The Panel stands by its findings as accurate statements of the facts shown by the evidence and nothing argued or provided by appellant in his petition persuades us otherwise.

We conclude that appellant has not established any valid grounds for a new hearing. Consequently, we deny his petition.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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

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