OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011840
	) CDTFA Case ID: 877102
JULIA ELLEN DRAPER	) CDTFA Acct. No. 102-205789
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Brian L. Coggins, Attorney Julia Ellen Draper
For Respondent:	Mengjun He, Tax Counsel III Monica Silva, Tax Counsel IV Kevin Hanks, Hearing Representative
For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Julia Ellen Draper (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1], on a timely petition for reconsideration of a Notice of Successor Liability (NOSL). The NOSL is for $36,664.31 in tax, plus applicable interest, and penalties totaling $5,176.10, representing the unpaid liabilities of Ronald O. Bell (Mr. Bell), for the period July 1, 2011, through April 15, 2012. The NOSL reflects CDTFA's determination that appellant is liable as a successor for Mr. Bell's unpaid tax liabilities in accordance with R&TC section 6812.

Office of Tax Appeals (OTA) Administrative Law Judges Michael F. Geary, Linda C. Cheng, and Jeffrey G. Angeja, held an oral hearing for this matter in Sacramento, California, on September 24, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

[1] Sales taxes were formerly administered by the State Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

ISSUES

1. Whether the NOSL was issued timely.
2. Whether appellant is liable as a successor for Mr. Bell's unpaid tax liabilities.

FACTUAL FINDINGS

1. On March 28, 2012, appellant applied for a seller's permit to operate a restaurant doing business as "Creekside Diner" beginning on April 1, 2012. CDTFA issued the seller's permit to appellant with an effective date of April 1, 2012.
2. On her application for a seller's permit, appellant left blank the section on *Ownership and Organizational Changes.* Specifically, appellant did not answer the questions about whether she was buying an existing business and, if she was, about the details of that ownership change.
3. On April 16, 2012, appellant and Mr. Bell signed a purchase agreement (Agreement) whereby appellant agreed to purchase the assets of the Oak Tree Diner from Mr. Bell for $50,000. The Agreement states that the assets were located at 950 Oak Lane, Rio Linda, California (i.e., the business address for both restaurants), and specifies that appellant was purchasing the assets, but not the business, of the Oak Tree Diner. According to the Agreement, Mr. Bell had closed the Oak Tree Diner as of April 15, 2012, and he was responsible for all liabilities incurred by the Oak Tree Diner through that date.
4. On her April 19, 2012 application for an operating permit from the County of Sacramento, appellant declined to have a facility evaluation by checking the box indicating that "I have already assumed ownership and am operating this facility."
5. Appellant opened a restaurant known as the Creekside Diner at the location formerly known as the Oak Tree Diner, and she retained the Oak Tree Diner's telephone number. On May 14, 2012, CDTFA called the business location and spoke to appellant, who informed CDTFA that she had opened the Creekside Diner on April 16, 2012. After contacting Mr. Bell's accountant, who confirmed that the Oak Tree Diner closed on April 15, 2012, CDTFA closed out Mr. Bell's seller's permit, effective April 15, 2012, and changed the effective start date of appellant's seller's permit from April 1, 2012, to April 16, 2012.

6. After closing his business, Mr. Bell had unpaid sales and use tax liabilities remaining. CDTFA conducted an investigation to determine whether appellant was also responsible for Mr. Bell's liability as a successor to his business.
7. Appellant provided CDTFA with a copy of a Lease Extension and Addendum dated January 11, 2014, which showed that appellant and the owner of the property had agreed to extend Mr. Bell's lease until April 15, 2017.
8. The Creekside Diner's Business Property Statement for 2014 reported costs of fixtures and equipment purchased during 2012 of $26,662, and the Sacramento County Assessor's Office records showed the estimated value of the Oak Tree Diner's assets to be $22,517 for the fiscal year ending June 30, 2012.
9. CDTFA determined that appellant had purchased the business and not just the assets of the business, and issued the aforementioned NOSL.
10. Appellant timely filed a petition for redetermination, and CDTFA subsequently deleted $5,176.10 in penalties from appellant's liability, but otherwise denied the petition. This timely appeal followed.

DISCUSSION

Issue 1 – Whether the NOSL was issued timely.

To be timely, an NOSL must be mailed no later than three years after the date on which CDTFA receives written notice of the purchase of a business or stock of goods. (R&TC, § 6814, subd. (a); Cal. Code Regs., tit. 18, § 1702, subd. (d)(1).)

Appellant asserts that the NOSL issued to her on May 6, 2015, was untimely because it was issued more than three years after April 1, 2012, which is the date on which CDTFA issued a seller's permit to her, and thus, CDTFA should have had knowledge of the change of ownership for the business. According to appellant, she specifically told CDTFA that she was opening a restaurant because the old diner was closing. Therefore, appellant contends that CDTFA's action holding her liable as a successor is barred by the statute of limitations.

We disagree. Appellant's application for a seller's permit did not advise of any purchase of a business or stock, because appellant left blank the section on *Ownership and Organizational Changes*. Therefore, the seller's permit application could not have served as a "written notice of the purchase of a business or stock of goods." Appellant has provided no documentation or other

evidence showing that CDTFA received written notice that the Oak Tree Diner was closing and the Creekside Diner was opening in its place at any time prior to May 14, 2012, when CDTFA called the business phone number and appellant orally informed it that she had purchased Mr. Bell's business. Because the NOSL was issued on May 6, 2015, which is less than three years after appellant informed it of the change of ownership on May 14, 2012, we conclude that the NOSL was issued timely.

Issue 2 – Whether appellant is liable as a successor for Mr. Bell's unpaid tax liabilities.

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; *Appeal of 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 *ibid*; see also *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

R&TC section 6811 provides that if a person who has a sales tax liability sells his or her business or stock of goods, or quits the business, his or her successor shall withhold a sufficient amount (up to the amount of the purchase price of the business or stock of goods) to cover the tax liability of the former owner unless the former owner produces a receipt or certificate from CDTFA showing that the tax liability has been paid. R&TC section 6812, subdivision (a) provides, "If the purchaser of a business or stock of goods fails to withhold from the purchase price as required, he or she becomes personally liable for the payment of the amount required to be withheld by him or her to the extent of the purchase price, valued in money." The liability of the successor or purchaser of a business or stock of goods includes all tax, interest, and penalties incurred by the former owner as a result of operating the business. (Cal. Code Regs., tit. 18, § 1702, subd. (b).) Neither R&TC section 6811 nor R&TC section 6812 requires that a purchaser be aware of the seller's outstanding tax liability or expressly assume the seller's debts for successor liability to attach.

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

Here, there is no dispute that appellant paid $50,000 to Mr. Bell, and opened a diner in the same location as the diner that Mr. Bell had operated. Appellant retained the same phone number for her diner as the phone number that Mr. Bell had used, and she extended Mr. Bell's lease. CDTFA has shown that appellant reported purchases of fixtures and equipment totaling $26,662 for 2012 to the Sacramento County Assessor's Office, which is a significantly lower amount than the $50,000 she paid to Mr. Bell. Moreover, appellant's reported purchases of fixtures and equipment of $26,662 is a similar amount to the estimated value of the Oak Tree Diner's assets of $22,517 in the records of the Sacramento County Assessor's Office for the fiscal year ending June 30, 2012. Given the discrepancy between the amount appellant paid to Mr. Bell in April 2012 and the reported and estimated values of the fixtures and equipment she purchased in 2012, and the fact that she retained the same phone number and took over the same lease terms, we find that it was reasonable for CDTFA to conclude that appellant had purchased Mr. Bell's business, and not just the assets of the business. Further, there is no dispute that appellant failed to obtain a tax clearance certificate from CDTFA, or to withhold from the purchase price an amount sufficient to cover Mr. Bell's tax liability. Therefore, we find that CDTFA has met its minimal burden to show a reasonable basis for imposing successor liability on appellant, and therefore, the burden of proof shifts to appellant to show by a preponderance of the evidence that she should not be held liable as a successor.

Appellant argues that she is not liable as a successor because she only purchased the fixtures and equipment of the Oak Tree Diner and did not buy the business or a stock of goods. Appellant testified that in the middle of March 2012, she was told that the Oak Tree Diner, her then place of employment as a waitress, was going to close, and she spoke to Mr. Bell about

purchasing the equipment, furniture, and fixtures to enable her to open her own business in the same location. According to appellant's testimony, Mr. Bell had abandoned the Oak Tree Diner for approximately one week before appellant took control of the premises, and Mr. Bell had placed all of the equipment and assets into an off-site storage facility. Appellant states that during the period of abandonment, she and her family members installed new carpeting, painted the interior, and thoroughly cleaned the premises. Appellant stated that after the cleaning, painting, and carpeting were completed, it took her and her family four days to move the assets from the off-site storage facility into the Creekside premises. Appellant has not identified the date on which Mr. Bell allegedly abandoned the business, but appellant asserts that the premises were empty on April 15, 2012 when she was making final preparations for opening the new restaurant. Appellant stated during the hearing that she commenced operations on April 16, 2012, with a "soft grand opening."

Appellant asserts that her business, the Creekside Diner, is very different from the Oak Tree Diner in that she only serves breakfast and lunch at the Creekside Diner, while the Oak Tree Diner also served dinner, and because the Creekside Diner's menu is designed around the concept of "from scratch" menu items, which appellant claims is a complete departure from the menu items served by the Oak Tree Diner. Further, appellant asserts that while she serves authentic Mexican food specials on Mondays and Tuesdays, and serves shrimp tacos on Thursdays, the Oak Tree Diner did not serve any Mexican-style dishes. Appellant claims that after she signed the Agreement with Mr. Bell and gained access to the premises, it took about a week for her, with the help of many friends and relatives, to completely redo the interior of the location so that there was nothing left that might indicate to customers that the Oak Tree Diner was still in business.

Appellant points to the Agreement, which lists the equipment that she was purchasing from Mr. Bell "as is," and which states that she was not purchasing the business, the Oak Tree Diner. Appellant also provided a copy of her 2012 Federal Depreciation Schedule, which shows costs of equipment purchased on April 16, 2012, totaling $50,000. When asked why the Creekside Diner's Business Property Statement for 2014 showed reported costs of fixtures and equipment purchased during 2012 of $26,662, not $50,000 or more, appellant testified that her bookkeeper must have made a mistake by omitting asset purchases from the statement. When asked why appellant would pay $50,000 for fixtures and equipment that were only valued at

$22,517 by the Sacramento County Assessor's Office, appellant explained that, considering the alternative of purchasing new equipment and fixtures, a purchase price of $50,000 seemed reasonable based on her limited experience. With respect to keeping the same phone number, appellant stated that she was informed that she would not be able to get a new phone number with a "991" prefix, which she associated with Rio Linda. Since appellant believed that the "991" prefix was necessary to ensure that potential customers understood that the business was located in Rio Linda, appellant elected to keep the Oak Tree Diner's phone number with its "991" prefix. Appellant asserts that she never intended to purchase the Oak Tree Diner, as demonstrated by the totality of her actions.

We begin by analyzing the purchase price that appellant paid for the equipment. As stated above, appellant's Business Property Statement for 2014 showed reported costs of fixtures and equipment purchased during 2012 of $26,662. The total purchase amount was categorized in the statement as $24,000 for Leasehold Improvements – Fixtures, and $2,026 for Office Furniture & Equipment. According to appellant, the amount reported for Office Furniture & Equipment included $1,000 for a credit card machine and $1,026 for a safe purchased from third parties in 2012. Therefore, the reported cost of tangible assets purchased from Mr. Bell totaled $24,000. The reported cost of the assets for property tax purposes is significantly lower than the amounts reported on appellant's Federal Depreciation Schedule, which included $24,000 for furniture and fixtures, $18,600 for large equipment, $4,700 for small equipment, $1,500 for a steam table, and $1,200 for a stove, grill, and deep fryer. Appellant explains that her bookkeeper erred in reporting the figures for property tax purposes; however, appellant did not provide the bookkeeper's testimony as a witness during the hearing (even though appellant confirmed that the bookkeeper still works for appellant), so we are unable to corroborate the alleged error. That is, appellant has not met her burden of proving this assertion (see *Appeal of Magidow*, *supra*), and we are not persuaded that the bookkeeper erred.

In addition, because the reported cost of the assets purchased from Mr. Bell for property tax purposes is similar to the estimated value of the Oak Tree Diner's assets of $22,517 in the records of the Sacramento County Assessor's Office at the time Mr. Bell closed his business, we find it more likely than not that the cost of $24,000 that appellant reported for property tax purposes represents the amount she paid to Mr. Bell for the Oak Tree Diner's tangible assets. In other words, it is possible that appellant overpaid for the assets, but the preponderance of the

available evidence does not persuade us that she did so. Accordingly, we find that appellant's payment of $50,000 to Mr. Bell in exchange for approximately $24,000 worth of equipment is strong evidence that appellant did not just buy the equipment but instead bought the business.

Next, appellant's evidence is inconsistent regarding the timing of Mr. Bell's alleged abandonment of the Oak Tree Diner. For example, appellant testified that she began operations on April 16, 2012, with a "soft grand opening," yet appellant has also stated that she did not agree to buy the assets until April 15, at which time the assets were stored offsite and required four days' effort by her family to relocate the assets into the building and to renovate the premises. Both statements cannot be accurate. Similarly, appellant testified that Mr. Bell's business was closed for about one week before she began her operations, but appellant has not provided evidence to establish any exact dates of closure or when the assets were removed, and returned, if at all. And, the written purchase-and-sale agreement between appellant and Mr. Bell, dated April 15, 2012, expressly states that the assets were located on the premises, which contradicts the testimony that the assets were in storage at that time. Thus, appellant has not supplied evidence sufficient to persuade us that the assets were offsite when she purchased them.

Likewise, appellant's evidence is also inconsistent regarding the date on which she began her own operations. For example, on her April 19, 2012 application for an operating permit from the County of Sacramento, appellant declined to have a facility evaluation by checking the box indicating that "I have already assumed ownership and am operating this facility." On that document appellant also indicated that the transfer was a change in ownership and not a new business. Also, appellant stated on both her seller's permit application and her Fictitious Business Name Statement that she planned to commence operations on April 1, 2012. These documents are inconsistent with appellant's testimony that she did not begin operations at her restaurant prior to April 16, 2012, and instead indicate that appellant purchased and operated a business prior to April 16, 2012.

Thus, while it is possible that appellant only purchased Mr. Bell's fixtures and equipment but did not buy the business or a stock of goods, appellant's evidence, or lack thereof, fails to carry her burden of proof. Accordingly, based on all of the foregoing, we conclude that

appellant purchased Mr. Bell's business,[2] and that appellant is liable as a successor for the unpaid tax liabilities incurred by Mr. Bell.

HOLDINGS

1. The NOSL issued to appellant on May 6, 2015, was timely.
2. Appellant is liable as a successor for the unpaid tax liabilities of Mr. Bell.

DISPOSITION

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

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

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Linda C. Cheng
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Linda C. Cheng
Administrative Law Judge

Date Issued: 12/23/2019

[2] We note that our conclusion is contrary to the statement in appellant's asset purchase agreement that she is not buying the business of the Oak Tree Diner. Generally, the clear and explicit language of a contract governs its interpretation. (Cal. Civ. Code, § 1638.) However, if a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. (Cal. Civ. Code, § 1640.) Based on our finding that appellant paid $26,000 to Mr. Bell for the goodwill and other intangible assets of the Oak Tree Diner, we conclude that the statement, "Julia is not buying his business the Oak Tree Diner," is contrary to the facts of this transaction and thus we disregard it.