OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18011900
RAY J. PONEK and MARY ELLEN PONEK	Date Issued: September 10, 2019

OPINION

Representing the Parties:

For Appellant: John Raymond Panek, Jr.

For Respondent: Kevin B. Smith, Tax Counsel III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, John Raymond Panek, Jr. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's claim for refund for $3,296.40.[1]

Appellant waived his right to an oral hearing, and therefore, we decide this matter based on the written record.

ISSUES

1. Whether the Office of Tax Appeals (OTA) has jurisdiction to consider the propriety of CDTFA's levy, and if so, whether it was proper.
2. Whether appellant has established that further adjustments are warranted to the measure of tax.

[1] Prior to July 1, 2017, CDTFA's sales and use tax functions were administered by the State Board of Equalization (BOE). (See Gov. Code, § 15570.22.) Therefore, for ease of reference, when referring to acts or events that occurred prior to July 1, 2017, "CDTFA" shall refer to BOE.

FACTUAL FINDINGS

Vessel Purchase and the Poneks

1. On October 4, 2006, persons using the names Ray J. Ponek and Mary Ellen Ponek (collectively, the "Poneks"), jointly purchased a 1972 48-foot research vessel named "Genius US II Too" (Vessel), from Danielle M. Bates (Seller).
2. CDTFA received notice of the sale of the Vessel via a bill of sale form (Bill of Sale) filed with the United States Coast Guard (USCG). The Bill of Sale lists an address in Fullerton, California (Fullerton Address) for Ray J. Ponek, and an address in Long Beach, California (Long Beach Address) for Mary Ellen Ponek. The Bill of Sale also states that the Vessel was sold for "ONE DOLLAR AND OTHER VALUABLE CONSIDERATION UNLESS OTHERWISE STATED."
3. There is no evidence that Seller either held a California seller's permit, or was required to do so by reason of the number, scope, and character of her vessel sales in this state. Accordingly, CDTFA determined that the applicable tax, if any, was the use tax for which the purchaser would be liable.
4. Based on the California addresses for the Poneks as shown on the Bill of Sale, CDTFA further determined that the Poneks purchased the Vessel for storage, use, or other consumption in this state.
5. CDTFA then contacted the Poneks, requesting that they file a Consumer Use Tax Return reporting the purchase price of the Vessel and any applicable use tax.
6. Ray J. Ponek filed the requested return, reporting a purchase price of $1 and use tax due of $0.07750.
7. CDTFA determined that the $1 reported purchase price was grossly understated for a 48-foot vessel. Using what CDTFA found to be a historically accurate $1,500 per foot valuation for the Vessel, CDTFA issued a Notice of Determination (NOD) to the Poneks, asserting that they owe use tax as measured by the estimated Vessel purchase price of $72,000 ($1,500 x 48 feet).
8. Ray J. Ponek petitioned the NOD, disputing the $72,000 purchase price. This prompted CDTFA to contact Seller for additional information regarding the sale of the Vessel.
9. By letter dated April 1, 2008, Seller responded to CDTFA's inquiry, stating under penalty of perjury that she had made numerous repairs to the Vessel prior to its sale (e.g.,

replaced the engine and thru-hulls, painted the hull, topside, and interior, etc.), and that she sold it for $22,000. This letter indicates that it was prepared by Mark Graves on behalf of Seller, but was signed by both individuals. Based on Seller's response, CDTFA reduced its deficiency determination to reflect a purchase price of $22,000.

10. CDTFA also received a notarized letter in support of Ray J. Ponek's position from a Boise, Idaho address (Boise address), dated May 30, 2011. In this letter, an individual named Joseph Ke'Nab states that he is the manager of the property located at the Long Beach address, and that he is writing to inform CDTFA that the Poneks are no longer at that address. Mr. Ke'Nab goes on to explain that the Poneks were overseas visitors who have since returned to Europe, and that during their stay in California, they purchased an old, derelict vessel for $1.

11. Ray J. Ponek continued to dispute the Vessel purchase price, but was ultimately unsuccessful in his appeal. On December 11, 2011, the NOD became final. Thereafter, CDTFA began collection action against the Poneks.

CDTFA's Levy and the Paneks

12. As part of its collection efforts, CDTFA relied upon Accurint, an online research tool which uses public and commercially available records, to identify the potential aliases, relations, addresses and assets of the Poneks.

13. On March 2, 2012, CDTFA obtained an Accurint report for Mary Ellen *Panek*. This report shows, based on social security number matching, that she is associated with the alias Mary Ellen Ponek, and the Long Beach address.

14. CDTFA also obtained an Accurint report for John Ray Ponek dated April 28, 2014. This report shows, based on social security number matching, that he is associated with the aliases John Raymond *Panek* and Ray J. Ponek, and the Long Beach, Fullerton, and Boise addresses.

15. CDTFA also used the social security numbers associated with the Poneks to generate a Financial Institutions Records Match (FIRM) report. FIRM is a collection enforcement tool which utilizes automated data exchanges to identify the accounts of tax debtors held at financial institutions doing business in California. The FIRM report identified an account (Account) held at the Long Beach City Employees Federal Credit Union as belonging to Mary Ellen *Panek* and John *Panek*.

16. Based on the above information contained within the Accurint and FIRM reports, CDTFA determined that Mary Ellen Ponek and Mary Ellen *Panek* are the same person, and Ray J. Ponek and appellant are the same person.
17. On April 29, 2014, CDTFA levied the Account for $3,296.40 to satisfy the outstanding tax liabilities of the Poneks.
18. Appellant filed a timely refund claim for the levied funds, which was denied by CDTFA.
19. Appellant petitioned the denial of his refund claim, which CDTFA affirmed in a decision issued by its Appeals Bureau. This timely appeal followed.

DISCUSSION

Issue 1 – Whether OTA has jurisdiction to consider the propriety of CDTFA's levy, and if so, whether it was proper.

Except where the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal, OTA is without jurisdiction to consider whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of *any* substantive or procedural right. (Cal. Code Regs., tit. 18, § 30104(d).) As applied here, this means that OTA's jurisdiction is limited to considering the correctness of any tax, penalties or interest imposed by CDTFA, or the adequacy of any jurisdictionally related documents.

Appellant advances a multitude of arguments alleging that for one reason or another, CDTFA's levy was wrongful. These arguments involving issues pertaining to the identity of the tax debtor and the ownership of the levied account, however, have no bearing on any of the above items over which OTA has jurisdiction. Accordingly, we are unable to address appellant's contentions concerning the propriety of CDTFA's levy.

Issue 2 – Whether appellant has established that further adjustments are warranted to the measure of tax.

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, 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.) On appeal, CDTFA has a minimal, initial burden of showing that its determination was both reasonable and rational. (See *Schuman Aviation Co. Ltd. v. U.S.* (D. Hawai'i 2011) 816 F.Supp.2d 941, 950; *Todd v.*

McColgan (1949) 89 Cal.App.2d 509, 514; *Appeal of 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.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

We consider Seller's credibility in determining whether CDTFA has met its initial burden. In that regard, we can conceive of no motive or benefit to Seller in inflating the selling price of the Vessel, and in fact, doing so would be detrimental to her own interest in minimizing any potential capital gains or sales tax. Therefore, we find CDTFA's $22,000 determination based on Seller's representations to be both reasonable and rational.

Appellant insists, however, that the Vessel was purchased for $1 as confirmed by Joseph Ke'Nab and the Bill of Sale, and that this document is conclusive evidence of the purchase price because it was notarized, contemporaneously executed by the parties at the time of sale, and accepted by the USCG. Appellant further explains that the Vessel was over 30 years old and in a state of disrepair, it was sold for a nominal price by Seller to avoid any potential expenses associated with its continued maintenance or restoring it to a seaworthy condition, and it eventually sank.

Appellant also disputes CDTFA's determination that the Vessel was sold for $22,000, on grounds that Seller's April 1, 2008 letter is hearsay, was prepared by another individual, and is unsupported by any evidence.

Appellant's contention that the Vessel was purchased for a nominal consideration of $1 is unpersuasive. The Bill of Sale states that the Vessel was sold for "ONE DOLLAR **AND OTHER VALUABLE CONSIDERATION** UNLESS OTHERWISE STATED." (Emphasis added.) This clearly indicates that the Vessel was not sold for $1, but for some higher, undisclosed amount. This boilerplate phrase is also a common recital in many contracts, used to demonstrate an intent by the parties to be bound by the contract (see *Copple v. Aigeltinger* (1914) 167 Cal. 706, 709), and is not determinative of the actual consideration rendered. (See, e.g., *Feinberg v. Teitelbaum Furs, Inc.* (1965) 236 Cal.App.2d 744 [parol evidence admissible

to show additional consideration rendered when phrases such as "other valuable consideration" is used].) Therefore, we find the Bill of Sale to be unavailing in demonstrating that the Vessel was purchased for $1.

Concerning Mr. Ke'Nab's May 30, 2011 letter, there is no evidence indicating that Mr. Ke'Nab had personal knowledge of the events surrounding the sale of the Vessel, or any evidence corroborating his statements regarding the condition and purchase price of the Vessel. We also find it highly suspicious that Mr. Ke'Nab's address as provided in this letter, is one which Accurint reports is associated with appellant. For these reasons, we decline to give any weight to the statements made in Mr. Ke'Nab's letter.

In addition, the alleged sinking of the Vessel, even if true, might be attributable to any number of possible reasons, and does not necessarily establish that the Vessel was in a dilapidated state at the time of purchase or that it was in fact purchased for $1.

As to appellant's remaining contentions disputing the reliability of Seller's statements, "[t]he taxpayer must affirmatively establish the right to a refund of the taxes by a preponderance of the evidence [citation], and cannot simply assert error and shift to the state the burden of justifying the tax." (*Paine v. State Board of Equalization* (1982) 137 Cal.App.3d 438, 442.) In the absence of any credible evidence supporting that the Vessel was purchased for less than $22,000, these contentions are therefore insufficient to warrant any further adjustments.

HOLDINGS

1. OTA lacks jurisdiction to consider the propriety of CDTFA's levy.
2. Appellant has not established that further adjustments are warranted to the measure of tax.

DISPOSITION

CDTFA's denial of appellant's refund claim is sustained.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge