OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18103908
	) CDTFA Case No. 909789
PASATIEMPO INVESTMENTS, LTD PTN	) CDTFA Acct. No. SR GHC 052-056809
dba Back Nine Grill & Bar	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Steven J. Roth, Attorney

For Respondent: Jarrett Noble, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On November 20, 2019, the Office of Tax Appeals (OTA) issued an opinion in which it sustained a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by Pasatiempo Investments, LTD PTN (appellant). OTA's opinion denied appellant's petition for redetermination of CDTFA's Notice of Determination for $67,983.48 in tax, plus accrued interest, for the period April 1, 2011, through September 30, 2013. Appellant filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

As relevant here, good cause for a new hearing may be shown where the opinion was contrary to law, such that the substantial rights of the complaining party are materially affected. (Cal. Code Regs., tit. 18, § 30604(d); *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.) The question of whether the opinion is contrary to law is not one which involves a weighing of the evidence, but instead, requires a finding that the opinion is "unsupported by any substantial evidence"; that is, the record would justify a directed verdict against the prevailing party. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires a review of the opinion in a manner most favorable to the prevailing party, and an indulging of all legitimate and reasonable inferences to uphold the opinion if possible. (*Id*. at p. 907.) The question before us on a petition for rehearing does not involve examining the quality or nature of

the reasoning behind OTA's opinion, but whether that opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

Appellant argues that its PFR should be granted because the opinion is contrary to law. Appellant contends that OTA incorrectly determined that appellant did not transfer or sell its restaurant and bar business to Peachwood's Management Inc. (PMI). Appellant contends that the sale of its business to PMI is established by the actions of the parties and a written lease. Appellant asserts that a lease meets the definition of a sale, pursuant to Revenue and Taxation Code (R&TC) section 6006(a), which states that "Sale" means and includes any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Appellant also cites to R&TC section 6006.1, which states that the "granting of possession of tangible personal property by a lessor to a lessee, or to another person at the direction of the lessee, is a continuing sale in this state by the lessor for the duration of the lease …." Appellant argues that, as a result, there was a sale of the business and its liability should be limited pursuant to R&TC section 6071.1, which states that a predecessor's liability is limited to the quarter in which the business is transferred, and the three subsequent quarters.

CDTFA contends that there was no transfer of the business because, as held in OTA's opinion, appellant knowingly allowed and, in fact, required PMI to operate under its seller's permit. Therefore, CDTFA asserts that appellant is liable for the unpaid tax pursuant to California Code of Regulations, title 18, section (Regulation) 1699(f)(2), which states that a person holding a seller's permit will be held liable for any taxes, interest, and penalties incurred, through the date on which CDTFA is notified to cancel the permit, by any other person who, with the permit holder's actual or constructive knowledge, uses the permit in any way. As a result, CDTFA asserts that there is no limitation on appellant's liability pursuant to R&TC section 6071.1 and Regulation 1699(f)(3). CDTFA also contends that appellant is jointly and severally liable for the unpaid tax because PMI operated as appellant's concessionaire, pursuant to Regulation 1699(d).

There is no dispute between the parties that appellant is liable under Regulation 1699(f)(2), because it knowingly allowed and required PMI to operate under its seller's permit. Appellant only argues that its business was transferred to PMI through a lease agreement and, as a result, its liability should be limited to the quarter in which the business was

transferred, and the three subsequent quarters. (R&TC, § 6071.1(a); Cal. Code Regs., tit. 18, § 1699(f)(3).) However, this limitation does not apply in cases where, after the transfer, 80 percent or more of the real or ultimate ownership of the business transferred is held by the predecessor. (R&TC, § 6071.1(b); Cal. Code Regs., tit. 18, § 1699(f)(3).) Therefore, a transfer of a business for the purposes of R&TC section 6071.1 and Regulation 1699 is defined as requiring a transfer of the "ownership" of the business. Specifically, the limitation does not apply if there is no transfer of 80 percent or more of the "real or ultimate ownership" of the business. (*Ibid.*) There is no transfer of ownership in a lease. Accordingly, a lease, such as appellant's lease with PMI, does not qualify as a transfer of a business for the purposes of R&TC section 6071.1 and Regulation 1699, and there is no limitation on appellant's liability. Therefore, appellant has not shown the original opinion, which held that appellant is not entitled to a limitation of the liability pursuant to Regulation 1699(f), is contrary to law.[1]

Based on the foregoing, appellant has not demonstrated the opinion was contrary to law and has not alleged or established any other basis for granting a rehearing. Thus, we find appellant has not shown good cause for a new hearing as required by the authorities referenced above, and appellant's petition is hereby denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

I concur:

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Tommy Leung
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Tommy Leung
Administrative Law Judge

[1] We also note that, as discussed in the underlying opinion, appellant is jointly and severally liable for all of the unpaid tax because PMI operated as appellant's concessionaire, pursuant to Regulation 1699(d).

M. GEARY, concurring:

I concur in the majority's holding and disposition. I would simply find that there is sufficient evidence in the record to justify our opinion and that appellant has not shown that our opinion is contrary to law or established any grounds for a rehearing. I remain unpersuaded that California Code of Regulations, title 18, section 1699(f) applies in this case and note that respondent has only now argued otherwise.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

Date Issued: 4/29/2020