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2020 – OTA – 291
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19064866
CPC TRANSPORTATION COMPANY, LLC	CDTFA Account No. 052-054278 CDTFA Case IDs: 961001, 961002, 927171

OPINION

Representing the Parties:

For Appellant: John Lyon, Representative

For Respondent: Jarrett Noble, Tax Counsel III
Stephen Smith, Tax Counsel IV
Jason Parker, Chief of Headquarters Operations

For Office of Tax Appeals: Corin Saxton, Tax Counsel IV

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) sections 6561 and 6901, CPC Transportation Company, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] The decision denied appellant's petition for redetermination of the Notice of Determination (NOD) for a tax liability of $101,175.86, a penalty of $10,117.59, and applicable interest, for the period January 1, 2009, through December 31, 2009 (CDTFA case ID 961001). CDTFA also denied appellant's claim for refund for payments satisfying this liability (CDTFA case ID 927171).[2]

[1] Sales taxes were formerly administered by the State Board of Equalization (BOE). In 2017, functions of the BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to the BOE; and when referring to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] CDTFA also denied appellant's petition for redetermination of a June 7, 2016 NOD for a tax liability of $234,355.74, a penalty of $23,435.57, and applicable interest, for the period April 4, 2008, through December 31, 2008 (CDTFA Case ID 961002). However, appellant no longer disputes this NOD, as well as the claim for refund for payments satisfying this liability.

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Office of Tax Appeals Administrative Law Judges Keith T. Long, Josh Lambert, and Andrew J. Kwee held an oral hearing for this matter in Cerritos, California, on July 22, 2020.[3] At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether appellant is entitled to a refund of use tax paid on the transfer of vehicles from its parent company.

FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC) wholly owned by CalPortland Company (CPC), a California corporation. Appellant provides transportation services using trucks, tractors, and trailers.
2. CPC also is the sole owner of CalPortland Construction and other related companies. CPC prepares consolidated financial statements for its related companies for income tax purposes.
3. Appellant filed its articles of incorporation with the Secretary of State's Office on April 4, 2008. Appellant's operating agreement was effective as of April 4, 2008. The operating agreement states that CPC made an initial capital contribution of $100.
4. Upon audit, CDTFA discovered that CPC transferred vehicles measuring $1,093,793 to appellant on June 1, 2009. The vehicle transfers took place in California, but appellant did not pay use tax to CDTFA or the California Department of Motor Vehicles (DMV) upon registering the vehicles.
5. The vehicle transfers were recorded as credits and debits in an intercompany control account. Appellant explained that the intercompany control account is used to record movement between CPC and its subsidiaries. Appellant asserted that the vehicle transfers were capital contributions from CPC to a commencing LLC (here, appellant), with no consideration given except for the 100-percent ownership interest in appellant.[4] Appellant also argued that the credits and debits to the intercompany control account

[3] The oral hearing was noticed for Cerritos, California, and conducted electronically due to COVID-19.

[4] Appellant no longer argues that the vehicles were capital contributions from CPC to a commencing LLC.

were not used to clear any actual liabilities but were simply a way to transfer assets from CPC to appellant, and that upon consolidation the intercompany control account should net to zero.

6. Appellant provided sample journal entries recording the transfer of vehicles from CPC, through the intercompany control account, and to appellant. Appellant did not provide any journal entries recording credits or debits to CPC's paid-in capital accounts.
7. CDTFA concluded that appellant made credit and debit entries to the intercompany account but failed to show that those entries were not used to clear any of CPC's liabilities to appellant.
8. On June 10, 2016, CDTFA issued the aforementioned NOD, and appellant made payments satisfying the liability. Thereafter, appellant filed a timely petition for redetermination and claim for refund, which CDTFA denied. This appeal followed.

DISCUSSION

In general, separate legal entities should not be disregarded merely to grant relief from taxation, even when one corporation wholly owns the other and the corporations share directors and officers. (*Appeal of Bachor,* 2020-OTA-172P; *Mapo, Inc. v. State Bd. of Equalization* (1975) 53 Cal.App.3d 245, 248 (*Mapo*).) A parent corporation's ownership of all the stock of its subsidiary does not, on its own, establish that the separate entities should be treated as one and the same for sales and use tax purposes. (*Macrodyne Industries, Inc. v. State Bd. of Equalization* (1987) 192 Cal.App.3d 579, 582, disapproved on another ground in *Beatrice Co. v. State Bd. of Equalization* (1993) 6 Cal. 4th 767, 779 (*Beatrice*).) Intercorporate transactions are subject to the same rules that apply to all taxpayers unless a statutory or regulatory exception is applicable. (*Beatrice, supra,* 6 Cal.4th at 776.)

When a vehicle required to be registered under the Vehicle Code is sold at retail by other than certain licensed persons, the purchaser of the vehicle shall pay the use tax to the DMV acting for and on behalf of CDTFA. (R&TC, § 6292(a).) "Sale" and "purchase" include any transfer of title or possession of tangible personal property for a consideration. (R&TC, §§ 6006(a), 6010(a).) Consideration is any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he or she is at the time of consent lawfully bound to suffer, as an inducement to the promisor. (Civ. Code, § 1605.) The

existence of consideration for a transfer of assets is as much one of contract law as it is of tax law. (*Beatrice*, *supra*, 6 Cal.4th at 774.) The total amount of the sale price includes all receipts, cash, credits and property of any kind. (R&TC, § 6012(b)(2); see also *Northwestern Pac. R.R. Co. v. State Bd. of Equalization* (1943) 21 Cal.2d 524, 529.)

By statute, the law generally imposes the burden on the retailer to establish that sales tax is inapplicable, and on the purchaser to establish that use tax is inapplicable. (R&TC, §§ 6091, 6241.) Furthermore, a taxpayer bears the burden of proving entitlement to an exemption or exclusion and must provide some credible evidence of that entitlement. (*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 442-443 (*Paine*);[5] *Honeywell, Inc. v. State Board of Equalization* (1982) 128 Cal.App.3d 739, 744.) The applicable burden of proof is by a preponderance of the evidence. (Evid. Code, § 115; *Appeal of Estate of Gillespie,* 2018-OTA-052P.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

Initially, we address appellant's contentions that it should not carry the burden of proof. Specifically, appellant asserts that *Paine* should not apply in this case.[6] Appellant asserts that in *Paine, supra,* the taxpayer failed to properly maintain exemption certificates associated with sales to customers, which were clearly required by regulation. Appellant argues that in its own appeal, the record keeping requirement is not specifically identified in a regulation or other administrative guideline and therefore *Paine* is inapplicable.

Here, the vehicles were purchased and transferred to appellant within this state; therefore, it is presumed that appellant made a taxable purchase for storage, use, or consumption in this state. (R&TC, § 6241; Cal. Code Regs., tit. 18, § 1610(c)(1)(A).) Furthermore, the court's finding in *Paine* is not based on the factual circumstances of that case. Instead the court in *Paine* applies the legal findings of other unrelated cases to place the burden of proof on the taxpayer. (See *Paine*, *supra*, 137 Cal.App.3d 438, 442 [citations omitted].) This office has applied *Paine*

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[5] As discussed below, appellant asserts that *Paine* is not applicable in this case.

[6] Appellant also cites CDFTA Audit Manual section 0409.55 to argue that the burden of proof should be a "test of reasonableness," which considers all of the facts and circumstances. CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures and has no precedential value in an appeal before OTA. As such, we do not further address appellant's contention based on the audit manual because OTA is bound to correctly apply the law irrespective of any CDTFA policy or procedure.

in assigning the taxpayer with the burden of showing entitlement to a claimed exemption. (See *Appeal of Owens-Brockway Glass Container, Inc,* 2019-OTA-158P.) Accordingly, we find that the question of whether appellant bears the burden of showing entitlement to an exemption is settled, and we apply it here.

Next, we consider whether appellant is liable for use tax on the transfer of vehicles from CPC. Here, there is no dispute that CPC transferred vehicles to appellant, and that the transfer was not for the nontaxable purposes of resale. There is also no dispute that these vehicle transfers were recorded as credits and debits in an intercompany control account. Citing CDTFA's Sales and Use Tax Annotation (annotation) 495.0736.850 (5/9/96), appellant argues that it is not liable for any use tax because CPC did not receive any consideration for the transferred vehicles. Appellant asserts that there is no evidence that the transfer of assets created an intercompany debt, cancelled an indebtedness, or was made in return for additional ownership interest in the LLC.[7]

Annotation 495.0736.850[8] considers whether a company's planned transfer of tangible personal property to its subsidiary as a capital contribution is subject to tax. In the annotation, the parent company stated that its subsidiary would not receive any consideration. The annotation explains that where no consideration is given, there is no sale and therefore no sales or use tax applies. The annotation notes that "consideration would include the assumption of…liabilities by [the subsidiary'], an intercompany debt, the cancellation of indebtedness, or…receipt of any additional shares in [the subsidiary.]" The annotation also states, "Of course, since you have not provided us with a copy of the relevant contract(s), we cannot say for certain that the transfer does not involve consideration given in exchange for the property." Thus, the annotation cited by appellant requires evidence that a transfer does not involve consideration given in exchange for property.

[7] CPC was appellant's sole owner prior to the transfer of vehicles to appellant.

[8] CDTFA's annotations are not regulations, and they are not binding upon taxpayers, CDTFA, or OTA. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) The annotations are digests of opinions written by the legal staff of CDTFA which are evidence of administrative interpretations made by CDTFA in the normal course of its administration of the Sales and Use Tax Law. (*Ibid*.) The annotations have substantial precedential effect within CDTFA and the interpretation of its meaning whether embodied in a formal rule or less formal representation. (*Ibid*.) The annotations are entitled to great weight when as here, CDTFA is construing a statute it is charged with administering and that statutory interpretation is longstanding. (*Ibid*.)

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Appellant has not provided any contracts for the vehicle transfers from CPC. Indeed, at the appeals hearing, appellant confirmed that no such contracts existed. Appellant also has not provided any evidence (such as detailed journal entries) that CPC did not receive any consideration. We acknowledge that there are no liens recorded on the vehicle title documents that appellant provided. However, consideration is not limited to CPC's liability on the vehicles. Consideration may include credits of any kind. (R&TC, § 6012(b)(2); see also *Northwestern Pac. R.R. Co. v. State Bd. of Equalization*, *supra*.) This includes the assumption of an intercompany debt or the cancellation of indebtedness. Appellant has not provided sufficient evidence for us to determine that appellant did not confer some benefit to CPC.

Finally, we reiterate the general rule that separate legal entities should not be disregarded merely to grant relief from taxation, even when one corporation wholly owns the other. (*Appeal of Bachor*, *supra*; *Mapo*, *supra*, 53 Cal.App.3d 245, 248.) Appellant has not argued, and we find no evidence that an exception should apply here. As such, we conclude that appellant has failed to meet its burden and that the vehicle transfers are subject to tax.

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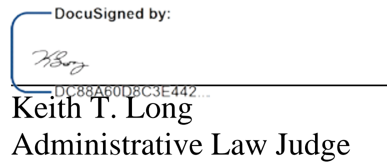
HOLDING

Appellant has not shown that it is entitled to a refund of use tax paid on the transfer of vehicles from its parent.

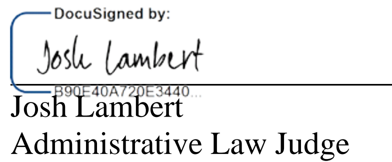
DISPOSITION

Sustain CDTFA's action in full.

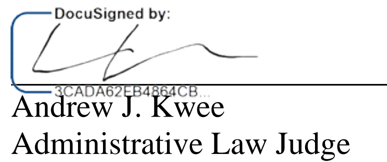


Keith T. Long
Administrative Law Judge

We concur:



Josh Lambert
Administrative Law Judge



Andrew J. Kwee
Administrative Law Judge

Date Issued: 8/12/2020