

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

F. MEHRJERDI
dba Sebastopol Fast Gas) OTA Case No. 19024324
) CDTFA Case IDs 566514, 852214, 916749
)
)
)
)**OPINION**

Representing the Parties:

For Appellant:

Mitchell Stradford, Representative
James Dumler, Representative

For Respondent:

Chad Bacchus, Tax Counsel IV
Cary Huxsoll, Tax Counsel IV
Jason Parker, Chief of Headquarters
Operations

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, F. Mehrjerdi (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellant’s timely petitions for redetermination of two Notices of Determination (NODs): the first, dated February 4, 2011, for tax of \$237,449.23, plus applicable interest, and a negligence penalty of \$23,744.94, for the period March 22, 2007, through September 30, 2009; and the second, dated October 29, 2014, for tax of \$70,808.09, plus applicable interest, and a negligence penalty of \$7,080.79, for the period October 1, 2009, through June 30, 2010.

Office of Tax Appeals (OTA) Administrative Law Judges Suzanne B. Brown, Josh Lambert, and Keith T. Long held an oral hearing for this matter in Sacramento, California, on August 26, 2021. 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 (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, “CDTFA” shall refer to BOE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, “CDTFA” shall refer to CDTFA.

ISSUE

Whether the NODs in this matter were issued to the wrong taxpayer and therefore must be cancelled.

FACTUAL FINDINGS

1. On March 22, 2007, appellant opened a seller's permit as a sole proprietor to operate a gasoline station and mini-mart known as Sebastopol Fast Gas (the Sebastopol Fast Gas permit).
2. During the audit periods, appellant held a full-time job as a pharmacist and did not operate or participate in the operation of Sebastopol Fast Gas. The business was operated by appellant's husband, A. Kazemini.
3. During the audit periods, appellant filed sales and use tax returns under the Sebastopol Fast Gas permit.
4. During the audit periods, appellant and appellant's husband operated another gasoline station (Kenwood Food & Gas) as a partnership. Appellant and appellant's husband held a separate seller's permit for this location (the Kenwood Food & Gas permit).
5. It is undisputed that some of the bank accounts for Sebastopol Fast Gas (the sole-proprietorship business) were jointly held with Kenwood Food & Gas (the partnership).
6. Appellant and appellant's husband filed a 2007 federal income tax return using the married filing jointly tax filing status. Appellant and appellant's husband reported income information for both Sebastopol Fast Gas and Kenwood Food & Gas on the same Schedule C form of that federal income tax return.
7. CDTFA audited the business for the period March 22, 2007, through September 30, 2009, and found a deficiency measure of \$2,748,299, consisting of unreported fuel sales of \$2,728,884 and additional taxable sales of \$19,415. CDTFA also audited the business for the period October 1, 2009, through June 30, 2010, and found unreported taxable sales of \$765,492.²
8. According to the notes entered on CDTFA's *Assignment Activity History* (Form 414-Z), on March 5, 2010, CDTFA informed appellant's husband that it believed the Sebastopol

² The taxable measure of each audit is not in dispute and therefore will not be discussed further.

- Fast Gas permit, which showed the business as a sole proprietorship was incorrect, and that appellant's husband should be listed as a co-owner.³
9. According to the Form 414-Z, appellant's husband contacted CDTFA on March 9, 2010, and stated that he had not yet completed a new seller's permit application to register the business as a partnership between himself and appellant.
 10. According to CDTFA's records,⁴ on April 7, 2010, appellant's husband signed a statement requesting that the Sebastopol Fast Gas permit be closed as of March 31, 2010. Appellant's husband requested that Sebastopol Fast Gas be added as a sublocation onto the Kenwood Food & Gas permit. CDTFA's records (with a computer entry date of May 19, 2010) also indicate that the March 31, 2010 Sebastopol Fast Gas permit closeout date should be disregarded.⁵ CDTFA's records (with a computer entry date of June 28, 2010) also state that appellant subsequently requested the Sebastopol Fast Gas permit be closed as of June 30, 2010. Also, a July 8, 2010 note on the Form 414-Z states that the ownership of the account would change as of July 1, 2010, and noted that for the audit period of March 22, 2007, through September 30, 2009, the account "was operated as a sole proprietorship."
 11. During the audits, appellant signed a Waiver of Limitation form dated March 8, 2010, waiving the applicable statute of limitations for CDTFA to perform an audit. The waiver indicated that appellant was the business owner. Thereafter, appellant, appellant's husband, or appellant's representative signed waivers or waiver extensions on September 23, 2010, October 31, 2013, June 14, 2013, January 2, 2014, and June 26, 2014.⁶ The waivers and extensions all included the Sebastopol Fast Gas permit number.

³ A February 2, 2010 entry on the Form 414-Z indicates the auditor's belief that the seller's permit should be held by appellant and appellant's husband. However, the auditor stated that they would wait until the next office visit and did not speak to appellant's husband about the seller's permit that day.

⁴ These records consist of computer data entries. CDTFA provided OTA and appellant with screen printouts that have been admitted into evidence during this appeal.

⁵ CDTFA's records indicate that the March 31, 2010 closeout date should be disregarded. This is apparently in connection with a Notice of Suspension dated May 13, 2010, which CDTFA's Investigations and Special Operations Bureau (ISOB) issued to appellant suspending appellant's Cigarette and Tobacco Product Retailer License for 20 days. CDTFA did not provide a copy of the notice suspending appellant's license.

⁶ These dates encompass timely waivers of limitation received for both audit periods.

12. On February 4, 2011, CDTFA issued an NOD to appellant for the period March 22, 2007, through September 30, 2009.
13. On May 18, 2012, CDTFA commenced an audit of Sebastopol Fast Gas for the period October 1, 2009, through June 30, 2010. On October 29, 2014, CDTFA issued an NOD associated with this audit.
14. Appellant filed timely petitions for redetermination. During her appeals with CDTFA, appellant did not assert that the NOD was issued to the incorrect person or that she was not the owner of the business. On January 26, 2016, CDTFA issued a decision for the first audit increasing the taxable measure to \$2,803,017 for the period March 22, 2007, through September 30, 2009. On February 26, 2016, CDTFA issued a decision for the second audit reducing the taxable measure from \$765,492 to \$733,048. CDTFA otherwise denied appellant's petitions for redetermination. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)1.)

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. (*Appeal of Talavera*, 2020-OTA-022P.) 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. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Except as explained in California Code of Regulations, title 18, section 1699(f)(3), 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. (*Appeal of Pasatiempo Investments, Ltd.*, 2020-OTA-069P; Cal. Code Regs., tit.18, § 1699(f)(2).)

Here, there is no dispute that appellant was issued a seller's permit as a sole proprietor. Nevertheless, appellant argues that the NOD was issued to the wrong person and must be cancelled. Appellant's contentions are predicated on notes written by CDTFA's auditor which reflect CDTFA's belief that the seller's permit should be registered as a partnership (co-owned by appellant and appellant's husband). CDTFA does not dispute that it made these notes, nor is there any dispute as to the accuracy of the notes. However, CDTFA argues that appellant's business was not a partnership during the audit periods. In addition, CDTFA argues that it previously recognized a married co-ownership as a type of business entity. CDTFA now asserts that a married co-ownership is not recognized as its own type of business entity.

The term "partnership" means an association of two or more persons to carry on as co-owners a business for profit, whether or not the persons intend to form a partnership. (Corp. Code, §§ 16101(a)(9), 16202(a).) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property. (Corp. Code, § 16202(c)(1).) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived. Where there is a written agreement, the intent to form a partnership should be ascertained primarily from the agreement. (*Security Pac. Nat. Bank v. Matek* (1985) 175 Cal.App.3d 1071, 1075.) For classification purposes, an entity wholly owned by a husband and wife as community property that is treated as a disregarded entity for income tax purposes (i.e., a sole proprietorship) is accepted as such by the IRS. (IRS Revenue Procedure (Rev. Proc) 2002-69.)

Here, we examine whether the business was a partnership during the audit periods. During the audit, CDTFA's own auditor stated that the business should be registered as a partnership. Indeed, there is no dispute that appellant held a different job and that appellant's husband operated the business during the audit periods. As such, we find that there is some evidence that appellant's husband co-owned the business, and the business was a partnership.

On the other hand, appellant has not provided any evidence, other than CDTFA's notes, that a partnership existed. For example, appellant did not provide a partnership agreement showing the formation of a partnership. Additionally, appellant obtained a seller's permit for the business as a sole proprietor; appellant filed sales and use tax returns for Sebastopol Fast Gas under her seller's permit as sole proprietor; and appellant signed Waiver of Limitations forms identifying herself as the owner.

Moreover, appellant and her husband reported income from Sebastopol Fast Gas on Schedule C of their federal income tax return instead of filing a federal form 1065, U.S. Return of Partnership Income. Hence, this evidence shows that appellant and her husband chose to classify their business as a disregarded entity (in this case a sole proprietorship) and not a partnership for federal income tax purposes. (See Rev. Proc. 2002-69.) Additionally, while a federal return may be evidence that appellants had a joint or common interest in gross returns, that interest does not by itself establish a partnership. (Corp. Code, § 16202(c)(1); *Security Pac. Nat. Bank v. Matek, supra.*)

Next, CDTFA's electronic records indicate that on April 7, 2010, appellant's husband⁷ requested the closure of appellant's seller's permit effective March 31, 2010. Thereafter, appellant requested that CDTFA close the seller's permit on June 30, 2010, the last day of the audit period. These records further support a finding that appellant consciously elected to keep the business a sole proprietorship throughout the audit periods. Thus, based on all of the foregoing evidence, we find that the business was a sole proprietorship.

Finally, appellant attempts to frame her appeal as a question of successor liability. Appellant appears to argue that Sebastopol Fast Gas was operated by the co-owned partnership as a successor to the sole proprietorship. Appellant argues that when a person or entity does business using the seller's permit of its predecessor, the returns are regarded as returns filed by the actual seller, and the three-year statute of limitations under R&TC section 6487 applies.⁸

⁷ During the audit, CDTFA obtained a Power of Attorney form authorizing appellant's husband to represent appellant during the audit of the business.

⁸ Appellant relies on CDTFA's Business Taxes Law Guide Annotations 465.1542 (3/10/1982) and 465.1544 (12/19/1996) to support this contention. CDTFA's annotations are not regulations, and they are not binding upon taxpayers, CDTFA, or OTA. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P; Cal. Code Regs., tit. 18, § 35101.) 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. (*Appeal of Martinez Steel Corporation, supra.*) The annotations have substantial precedential

However, as discussed above, appellant requested that her seller's permit be closed as of June 30, 2010, the last day of the audit period. As a result, the earliest possible time that there could have been a successor was July 1, 2010. As such, there is no statute of limitations issue because waivers of the statute of limitations were properly obtained by CDTFA for appellant's seller's permit.

With regard to the fact that appellant's husband operated the business, we note that a permit holder is liable for taxes, interest, and penalties incurred by any other person who uses the permit in any way and does not state that it applies only to circumstances involving a transferor and transferee. (*Appeal of Pasatiempo Investments, Ltd., supra*; see also Cal. Code Regs., tit. 18, § 1699(f)(2).) Appellant's name was on the seller's permit and appellant had actual knowledge of her husband's use of the permit. Thus, the NOD was properly issued to appellant and appellant is liable for the unpaid tax.

Accordingly, we find no basis to cancel the NODs.

HOLDING

The NODs in this matter were issued to the correct taxpayer.

DISPOSITION

CDTFA's actions regarding the appeals are sustained.

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Keith T. Long

Administrative Law Judge

We concur:

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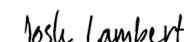


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Suzanne B. Brown

Administrative Law Judge

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Josh Lambert

Administrative Law Judge

Date Issued: 10/7/2021

effect within CDTFA and the interpretation of its meaning whether embodied in a formal rule or less formal representation. (*Ibid.*)