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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19024287
	CDTFA Case ID: 956371
PARTNERSHIP OF	
R. JACKSON AND	
A. JACKSON[1]	

OPINION

Representing the Parties:

For Appellant:	R. Jackson, Partner A. Jackson, Partner
For Respondent:	Courtney Daniels, Tax Counsel III Stephen Smith, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, the Partnership of R. Jackson and A. Jackson (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[2] denying appellant's claim for refund of $17,532.71.[3] Appellant made the claimed overpayment in connection with a Notice of Determination (NOD) that CDTFA issued to appellant on July 15, 2011. The NOD was for $18,069 in tax, plus accrued interest. On January 7, 2016, CDTFA reduced the tax assessment to $10,890.

[1] Respondent California Department of Tax and Fee Administration issued the Notice of Determination to the "Partnership of [R.] Jackson et al." There are two partners: R. Jackson and A. Jackson, a married couple.

[2] Sales and use taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22; R&TC, § 20.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

[3] This includes the following amounts paid by appellant: tax of $10,890.00, $4,656.88 in interest, a penalty for failing to pay the liability by the time it became final of $1,089.00, a collection cost recovery fee of $550, and a transaction service fee of $346.83 charged by the credit card vendor that processed appellant's payment.

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Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Andrea L.H. Long, and Andrew Wong held an electronic oral hearing for this matter on February 9, 2022.[4] At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUES

1. Whether California use tax applies to appellant's storage, use, or consumption of the vessel.
2. Whether appellant has established a basis for relief of the liability.

FACTUAL FINDINGS

1. On December 1, 2009, appellant submitted a written offer to purchase a 2000 Catalina 42 (vessel), the "Salty Paws 3," from M. Kwee (seller), the owner of the vessel.[5] The vessel was listed for sale by Catalina Yacht Anchorage (broker), a broker with offices in Ventura, California, and Marina del Rey, California. The vessel was docked in Marina Del Rey, California.
2. Pursuant to the purchase and sale agreement, appellant was to pay $132,000 for the vessel, plus $88,995 for equipment repairs and upgrades. Tax was not collected or remitted to this state on the transaction.
3. On December 23, 2009, the parties signed a bill of sale for the vessel, which transferred 100 percent of the seller's "title and interest" in the vessel to appellant. According to the bill of sale, appellant purchased the vessel "as is" and "where is" and "with all faults," and "no warranty express or implied."
4. The parties recorded the bill of sale for the vessel on January 7, 2010. The reported date of sale for the vessel was December 23, 2009.
5. During the oral hearing, appellant conceded that, for purposes of the time of title transfer, the document transferring title on December 23, 2009, speaks for itself.

[4] The oral hearing was noticed for Cerritos, California, but conducted electronically with the agreement of both parties.

[5] Out of an abundance of caution, we note that Administrative Law Judge Andrew J. Kwee has no known relationship, familial or otherwise, with the seller.

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6. It is undisputed that following the sale, but prior to delivery of the vessel to appellant, all the repairs and improvements to the vessel were made in California. During this time, the broker had possession of the vessel. The broker represented both the seller and appellant in the transaction. Appellant explained to CDTFA that "My agreement with the broker, Catalina Yachts, was that we would buy the boat provided the boat was put in condition to live aboard in Mexico and could be delivered there so that no sales [tax] would needed [sic] to be paid."
7. Appellant obtained a vessel loan for $151,920. On January 7, 2010, appellant's lender, Bank of America, recorded its mortgage (lien interest) on the vessel in the amount of $151,920, and reported the date of sale as December 23, 2009.
8. On January 20, 2010, appellant changed the vessel's name to "Embarq," and recorded the name change with the United States Coast Guard.
9. Following completion of the repair and upgrade work, the vessel departed from Ventura, California, on April 26, 2010, and arrived in Marina Puerto Escondido in Baja Sur, Mexico on May 7, 2010. This was the first time the vessel left California since at least December 1, 2009, when appellant submitted the offer to purchase the vessel.
10. According to an Offshore Delivery Affidavit (affidavit) dated May 7, 2010, the broker delivered possession of the vessel to appellant on May 7, 2010, in Marina Puerto Escondido, Baja Sur, Mexico. The affidavit states that the port of departure, where the vessel was located prior to the reported delivery, was in Ventura, California.[6] The affidavit also states the seller's address was in Marina del Rey, California, and appellant's address was in Ventura, California.
11. On or about August 27, 2010, CDTFA contacted the seller for additional information regarding appellant's purchase of the vessel. The seller submitted to CDTFA a declaration signed under penalty of perjury, dated August 31, 2010. In her declaration, the seller stated that the sale occurred on December 23, 2009, delivery occurred in Marina del Rey, California, and the sales price was $132,000.
12. On or about February 4, 2011, appellant sold the vessel to K. Flint for $165,000. During the oral hearing, R. Jackson explained that he and his wife were in bankruptcy and the

[6] At some point the vessel was moved from the broker's location in Marina Del Rey, California, to the broker's location in Ventura, California. The exact date of the movement of the vessel is immaterial.

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vessel was brought back to California for the first time for purposes of sale related to the bankruptcy.

13. CDTFA determined that appellant had purchased the vessel for use in this state, for a purchase price of $219,000. On July 15, 2011, CDTFA issued the NOD to appellant.

14. The NOD informed appellant of its right to timely file a petition for redetermination within 30 days to appeal the liability, and informed appellant that filing a petition will not prevent the accrual of interest on the unpaid liability. Appellant did not petition the liability and it became final.

15. On August 15, 2011, CDTFA imposed a 10 percent penalty for failing to pay the liability before it became final (finality penalty). Thereafter, on November 29, 2011, CDTFA imposed a $550 collection cost recovery fee when appellant failed to timely pay the liability in response to a demand for immediate payment (demand).

16. On January 7, 2016, CDTFA reduced the assessment to $10,980 in tax (which also reduced the 10 percent finality penalty) and issued another demand. The reduced assessment reflected CDTFA's determination that the purchase price was $132,000.

17. On June 16, 2016, the Franchise Tax Board intercepted $2,106.40 in funds payable to A. Jackson and redirected them to CDTFA in partial satisfaction of appellant's liability. On July 10, 2016, appellant filed a protective claim for refund for this payment, which CDTFA had applied entirely to the unpaid tax.

18. On November 9, 2017, appellant paid CDTFA $15,426.31, representing the balance of the liabilities disclosed in the demand, plus a credit card processing fee. Appellant also filed a timely perfected claim for refund for the full liability.

19. In a decision dated January 3, 2019, CDTFA denied appellant's claim for refund. This timely appeal followed.

20. On February 28, 2020, appellant submitted a request for relief of penalty, the collection cost recovery fee, and interest, signed under penalty of perjury, on the basis that CDTFA improperly imposed the sales tax. During a prehearing conference, appellant clarified that one of the reasons it is requesting relief of all taxes, interest, and penalties is because CDTFA informed appellant that appellant could not appeal CDTFA's NOD until after the tax has been paid in full, and that this rule violates appellant's right to due process and equal protection.

DISCUSSION

Issue 1 – Whether California use tax applies to appellant's storage, use, or consumption of the vessel.

The Date of Sale or Purchase of the Vessel

As a preliminary matter, the parties dispute the date and location of the sale or purchase of the vessel. For purposes of the Sales and Use Tax Law, the terms "sale" and "purchase" mean and include any transfer of title or possession, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. (R&TC, §§ 6006(a), 6010(a).)

With respect to the location of the vessel, the parties agree that the vessel was in Marina Puerto Escondido, Mexico, on May 7, 2010, and that the broker delivered the vessel to appellant on May 7, 2010. It is further undisputed that, prior to April 26, 2010 (the date the vessel left port in Ventura, California, for Mexico), the vessel had been docked in California since at least December 1, 2009, prior to the date of purchase. In a July 8, 2018 letter addressed to CDTFA, appellant conceded that (1) the vessel was located at Marina del Rey, California, at the time appellant first inspected it and, later, when appellant agreed to purchase it on December 1, 2009; (2) all repairs and improvements to the vessel were made while it was stored in Marina del Rey, California; (3) the broker's primary office was located in Marina del Rey, California; and (4) the broker had possession of the vessel from the date of purchase until it was delivered to appellant in Mexico on May 7, 2010. The broker's signed affidavit states that the vessel was in Ventura, California, prior to delivery to appellant. The seller's signed declaration further states that the vessel was in Marina del Rey, California, on December 23, 2009, which the seller also states was the date of sale. Based on the above evidence, we find that the vessel was located in California on December 23, 2009, when the seller transferred title to the vessel to appellant.

With respect to the consideration for the sale, it is undisputed that appellant paid the seller at least $132,000 (the measure of tax at issue in this appeal) for the vessel, and appellant took out a $151,920 mortgage with Bank of America to purchase the vessel. The lender recorded its $151,920 mortgage on the vessel and recorded the sale date of December 23, 2009. Therefore, we find that appellant purchased the vessel for no less than $132,000.

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With respect to the date of sale, the Sales and Use Tax Law provides that a sale or purchase includes any transfer of title or possession in lieu of a transfer of title, conditional or otherwise of tangible personal property for a consideration. (R&TC, §§ 6006(a), 6010(a).) In simplest terms, if there is a transfer of title, there is a sale. (*Ibid*.) Furthermore, if there is a transfer of possession in lieu of title, there is a sale. (*Ibid*.) When both elements are met, the sale occurs upon the earlier of title transfer or transfer of possession in lieu of title. (R&TC, § 6010(a); Cal. Code. Regs., tit. 18, § 1628(b)(3)(D).) Here, appellant obtained title to the vessel in California on December 23, 2009, which is prior to receiving possession in Mexico. The fact that appellant may have retained a broker to make repairs or upgrades to the vessel prior to transfer of possession is immaterial. Transfer of possession is not a required element to constitute a sale or purchase. (R&TC, §§ 6006(a), 6010(a).) As such, we find that the purchase occurred on December 23, 2009, the date of title transfer.

Appellant contends that it did not purchase the vessel until May 7, 2010, the date appellant obtained possession of the vessel. In support, appellant contends that the consideration for the sale was $219,000, consisting of the $132,000 for the vessel, and an additional $88,895 for upgrades made by the broker.[7] Appellant's position is that the upgrades were a condition of sale, and because the broker delivered the vessel to appellant in Mexico after completion of the upgrades, the sale occurred in Mexico. We understand appellant to be contending that the sale of the vessel qualified as a sale on approval. (Cal. Code. Regs., tit. 18, § 1628(b)(3)(C).) Nevertheless, appellant was unable to provide any documentation to support appellant's position that the upgrades were required as a condition of sale, or that appellant had the ability to reject the sale upon delivery of possession. To the contrary, the purchase and sale agreement specifies that "the vessel is sold 'as is', 'where is', and 'with all faults', no warranty express or implied." Additionally, on January 7, 2010, appellant's lender (Bank of America) recorded a preferred mortgage in the amount of $151,920 as of December 23, 2009, the date of title transfer, and identified appellant as the mortgagor. Finally, on January 20, 2010, appellant exercised rights consistent with ownership of the vessel, by changing its name from "Salty Paws 2" to "Embarq" with the United States Coast Guard. In any event, an "as-is" sale does not qualify as a sale on approval. (*Appeal of Snowflake Factory LLC*, 2020-OTA-270P.) As such, both the reason

[7] The assessed measure of tax at issue is $132,000. We offer no opinion on the application of tax to the $88,895 in vessel upgrades.

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appellant obtained possession on May 7, 2010, and the location where appellant eventually obtained possession, are not material.

In summary, since the seller transferred title to the vessel to appellant on December 23, 2009, in exchange for consideration of no less than $132,000, we find that appellant purchased the vessel on December 23, 2009. Furthermore, because the vessel was in California on December 23, 2009, we find that the sale and purchase occurred in California.

The Sales Tax

California imposes sales tax on a retailer, measured by the 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, §§ 6051, 6091.) The sale of a vessel is exempt from sales tax when the retailer is other than a person required to hold a California seller's permit by reason of the number, scope, and character of the person's sales of vessels in this state. (R&TC, § 6283(a); Cal. Code Regs., tit. 18, § 1610(b)(1)(C).) In the instant case, there is no evidence that the seller held a California seller's permit or that she made any other sales in this state aside from the single sale of the vessel to appellant, or that she had an office or other place of business in this state. Furthermore, during the hearing, appellant agreed that the tax at issue was the use tax. Therefore, we find that sales tax is inapplicable.

The Use Tax

Use tax applies unless the transaction was subject to sales tax. (R&TC, §§ 6201, 6401.) The reason for a sales tax exemption is immaterial for purposes of imposing the use tax. (See R&TC, § 6201.) When sales tax does not apply, such as when an in-state sale is exempt from sales tax or the sale occurs outside this state, use tax is imposed on the sales price of property purchased from a retailer for the storage, use, or other consumption of property within this state. (R&TC, §§ 6201, 6401.) The use tax is imposed on the person storing, using, or otherwise consuming the property. (R&TC, § 6202.) When a person purchases a vessel in this state and the sale is exempt from sales tax on the basis the seller was not required to hold a California seller's permit, "the purchaser must pay use tax measured by the sales price of the property to the purchaser." (Cal. Code Regs., tit. 18, § 1610(b)(1)(C).)

Above, we concluded that appellant purchased the vessel in this state on December 23, 2009. On December 23, 2009, the vessel was being stored in Marina del Rey,

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California. Use tax applies to the storage of property in this state. (R&TC, § 6202.) Therefore, absent a specific exemption or exclusion, use tax applies to appellant's storage, use, and consumption of the vessel in this state. Appellant contends that use tax is inapplicable because the vessel was not brought back to California within 12 months. (See Cal. Code. Regs., tit. 18, § 1620(b)(5).) Nevertheless, the 12-month test set forth in California Code of Regulations, title 18, (Regulation) section 1620(b)(5) only applies if the vessel was purchased outside this state. Here, since appellant purchased the vessel in California, the 12-month test is inapplicable and there is no other provision in the Regulation that would allow appellant to rebut that the vessel was purchased for use in California. Therefore, we find that the use tax applies.

Issue 2 - Whether appellant has established a basis for relief of the liability.

The Credit Card Processing Fee

As a preliminary matter, a claim for refund may be granted in connection with a payment of "[a]ny amount of tax, interest, or penalty [that] was not required to be paid." (R&TC, § 6901(a).) R&TC section 6901 does not authorize a refund of a charge imposed by and paid to a third party. (*Ibid*.) Here, appellant is asking OTA to refund a $346.83 service fee charged and collected by CDTFA's credit card processing vendor.[8] This amount is not a tax, interest, or penalty imposed pursuant to the R&TC, and was not paid to CDTFA. Therefore, we lack statutory authority to grant a refund of the $346.83 credit card processing fee that appellant incurred for the convenience of paying taxes by credit card.

Taxes, Interest, Finality Penalty, and Collection Cost Recovery Fee

With respect to the taxes, interest, finality penalty, and collection cost recovery fee, appellant requests relief on the basis that CDTFA informed appellant that appellant could not appeal CDTFA's NOD until after the tax has been paid in full, and such a policy violates

[8] Although the R&TC allows reimbursement of certain bank charges incurred for processing an erroneous CDTFA levy or other collection action, there is no statutory authority we are aware of that would authorize refunding a fee charged by a credit card company for the privilege of making a voluntary tax payment via credit card. (See R&TC, § 7096.)

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appellant's right to due process and equal protection.[9] CDTFA contends that appellant was required to pay the tax because appellant failed to timely petition the NOD.

As a preliminary matter, we note that the law imposes no requirement that a tax liability must be paid, in whole or part, before a taxpayer may timely petition an NOD. To the contrary, the law provides that any person against whom an NOD was issued has 30 days to timely petition the NOD. (R&TC, § 6561.) There is no statutory right to file an untimely petition of a NOD without payment of the tax. Under the Rules for Tax Appeals applicable to CDTFA at the time the underlying NOD was issued, if a taxpayer files a petition for redetermination after the 30-day period specified in R&TC section 6561 expires, CDTFA may, *in its discretion*, accept it as an administrative (late) protest. (Former Cal. Code Regs, tit. 18, § 5220 (2017).)[10] Otherwise, a claim for refund would need to be filed to pursue an appeal. (R&TC, § 6901.)

The NOD at issue informed appellant of the statutory right under R&TC section 6561 to file a timely petition within 30 days, and informed appellant that interest would continue to accrue on unpaid amounts even if a timely petition is filed. Thus, we find that appellant received written notice of the right to timely petition the NOD without payment of the liability. Appellant waived this right by failing to timely petition the NOD.[11]

R&TC section 6596 provides for relief of taxes, interest, and penalties under certain circumstances where a taxpayer's failure to timely pay the tax is due to reasonable reliance on written advice provided by CDTFA. R&TC section 6596 imposes four general requirements in order to grant relief, which are summarized, in pertinent part, as follows: First, the taxpayer must request in writing for advice on the application of tax from CDTFA, and the request must set forth the specific facts and circumstances of the activity or transactions for which the advice is requested. (R&TC, § 6596(b)(1).) Second, CDTFA must respond in writing, stating whether the described activity or transaction is subject to tax, or stating the conditions under which the

[9] During the hearing, appellant raised a new (or alternate) contention that the Sales and Use Tax Law violates the equal protection and due process clauses of the United States Constitution because it requires payment of the liability as a prerequisite to file an appeal; however, appellant cited no provision in the law to this effect. In response, CDTFA contended that OTA lacks jurisdiction to resolve constitutional issues.

[10] CDTFA has adopted a substantially similar rule for periods on or after January 1, 2018. (See Cal. Code. Regs., tit. 18, § 35019.)

[11] We note that OTA is an administrative agency and has no authority under the constitution to decline to enforce the R&TC, or to declare it unenforceable, based on constitutional grounds, absent a ruling by an appellate court. (Cal. Const., art. III, § 3.5.)

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activity or transaction is subject to tax. (R&TC, § 6596(b)(2).) Third, the taxpayer must reasonably rely on the written advice. (R&TC, § 6596(b)(3).) Fourth, the liability for taxes must occur before CDTFA rescinds the advice or a change in law renders the advice no longer valid. (R&TC, § 6596(b)(4).)

Here, appellant requests relief of the liability on the basis that CDTFA informed appellant that it could not file an appeal until after the liability was paid. Even if we were to accept that CDTFA provided this advice to appellant in writing, and that as a result appellant failed to timely file a petition, there is no basis under the law for relief of the liability.[12] Appellant does not contend that it requested written advice on the proposed transaction prior to purchasing the vessel. The alleged advice occurred after CDTFA already issued to appellant a determination for unpaid taxes, and interest thereon, for failing to timely report and pay the use tax to CDTFA. Relief under R&TC section 6596 is inapplicable because the third element, reliance, cannot be met as a matter of law under the facts alleged by appellant.

There are no other provisions in the R&TC that would authorize relief of all or any portion of the liability under the facts presented in this appeal. (See R&TC, §§ 6592, 6593.5, 6596, 6833.)

Appellant's only other contention is that the tax, interest, penalty, and fees must be relieved because CDTFA's determination is erroneous. For the reasons explained above, we already concluded that no adjustments are warranted to the liability as determined by CDTFA.

[12] There are no documents in the record to suggest that CDTFA provided written advice to this effect to appellant. To the contrary, the NOD informed appellant of the right to timely appeal without payment of the tax.

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HOLDINGS

1. California use tax applies to appellant's storage, use, or consumption of the vessel in this state.
2. Appellant failed to establish a basis for relief of the liability.

DISPOSITION

CDTFA's action is sustained.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

DocuSigned by:
8A4294817A67463...
Andrew Wong
Administrative Law Judge

Dated: 3/24/2022