

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 220410106
)	CDTFA Case ID 2-363-770
L. N. TRAN AND)	
P. T. PHAM,¹)	
dba Pho 88 Restaurant)	

OPINION

Representing the Parties:

For Appellant:² P. T. Pham

For Respondent: Jason Parker, Chief of Headquarters Ops.

For Office of Tax Appeals: Corin Saxton, Attorney IV

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, P. T. Pham (appellant) appeals a February 25, 2022 decision (Decision) issued by California Department of Tax and Fee Administration (respondent)³ denying appellant’s petition for redetermination of an October 15, 2020 Notice of Determination (NOD).⁴ The NOD is for tax of \$65,725.00, plus applicable interest for the period July 1, 2016, through March 31, 2020 (liability period).

¹ As explained below, the Notice of Determination that is the focus of this appeal was issued to L. N. Tran only. However, respondent treated appellant’s petition for redetermination as one filed on behalf of a husband-and-wife partnership, and it is the Office of Tax Appeals’ practice to follow the form of the caption created by the tax agency.

² There is nothing in the evidence to suggest that appellant appealed or appeared for any person or entity but herself.

³ Prior to July 1, 2017, sales and use taxes (and other business taxes and fees) were administered by respondent’s predecessor, the State Board of Equalization (BOE). When this Opinion refers to events that occurred before July 1, 2017, “respondent” refers to BOE.

⁴ The NOD was issued timely to L. N. Tran because he signed a series of waivers of the otherwise applicable three-year statute of limitations. The most recent waiver, signed on April 16, 2020, extended until October 31, 2020, the time within which respondent could issue an NOD for the period July 1, 2016, through June 30, 2017. (R&TC, § 6487(b), § 6488.)

This matter is being decided on the basis of the written record because appellant waived an oral hearing.

ISSUES

1. Did respondent issue the NOD to appellant or, if it did not, does appellant's timely petition for redetermination constitute a submission to jurisdiction or an assumption of the liability asserted in the NOD?
2. If either of the preceding questions is answered in the affirmative, is appellant entitled to any adjustments to the asserted liability?

FACTUAL FINDINGS

1. On January 11, 2011, L. N. Tran and appellant signed an Application for Seller's Permit to operate a restaurant named Pho 88 in Fullerton (the Fullerton restaurant). The application identified the applicant as a "general partnership." The box marked "other" was checked and the word "married" was written next to the "other" box. The "Married Co-ownership" box is not checked. The application identifies appellant as "partner" and L. N. Tran as "general partner (owner)."
2. On January 14, 2011, respondent issued seller's permit 101-702734 to L. N. Tran, doing business as Pho 88 Restaurant in Fullerton, with a mailing address at a post office box in Westminster, California.
3. On March 16, 2018, the account added a second restaurant location of Pho 88 Restaurant in Huntington Beach, California (the Huntington Beach restaurant).
4. On August 1, 2019, respondent mailed a letter to L. N. Tran notifying him that respondent would be auditing the business.
5. On August 5, 2019, L. N. Tran informed respondent that the business address continued to be the same post office box in Westminster.
6. On August 8, 2019, L. N. Tran executed a "Waiver of Limitation" (waiver) allowing respondent until April 30, 2020, to issue an NOD for the period third quarter of 2016 (3Q16) through 4Q16.
7. On August 8, 2019, L. N. Tran authorized a CPA to represent his interests as an individual and as the owner in connection with the audit. The power of attorney form

- identifies only L. N. Tran as the client and lists L. N. Tran’s post office box in Westminster.
8. On February 6, 2020, the CPA executed an extension of the waiver (through July 31, 2020) on behalf of L. N. Tran.
 9. On April 16, 2020, L. N. Tran executed a second extension of the waiver (through October 31, 2020).⁵
 10. The original waiver and both extensions indicate they were being executed on behalf of a sole proprietorship: L. N. Tran, dba Pho 88 Restaurant.
 11. Appellant and L. N. Tran divorced in December 2019, and as part of the divorce agreement, the Huntington Beach restaurant was awarded to L. N. Tran, and the Fullerton restaurant was awarded to appellant.
 12. Appellant applied for a seller’s permit in her name only to operate the Fullerton restaurant.⁶ In the application, appellant indicates that the “former owner address” was L. N. Tran’s post office box in Westminster. Nowhere on the application does it indicate that appellant would receive mail at that post office box. The application indicates that appellant’s business address was the Fullerton restaurant’s address.
 13. Respondent issued two seller’s permits to appellant (203456384 and 228654976), both effective January 1, 2020.⁷ Neither permit identifies a business name or location, but both refer to L. N. Tran’s post office box in Westminster.
 14. Respondent did not issue L. N. Tran a new seller’s permit for the Huntington Beach restaurant that had been awarded to him in the divorce. Instead, respondent allowed L. N. Tran to operate that restaurant under the original seller’s permit.⁸
 15. L. N. Tran closed the Huntington Beach restaurant effective January 15, 2020.

⁵ The evidence indicates that respondent was informed on April 13, 2020, that the CPA no longer represented L. N. Tran.

⁶ An April 9, 2021 letter from respondent to appellant indicates that appellant applied for a seller’s permit on May 21, 2020.

⁷ According to respondent’s April 9, 2021 letter to appellant denying innocent spouse relief (see Factual Finding 21, below), one of those permits was for appellant’s sole proprietor account for the Fullerton restaurant. The purpose of the other permit is not explained in the evidence.

⁸ Respondent’s Compliance Policy and Procedures Manual (CPPM) section 301.030 states that if a partner dissociates from a partnership or is otherwise removed and this results in only one partner remaining, the original permit should be closed and a new permit issued for the business.

16. The “Assignment Activity History” (414-Z), which purports to document what respondent did during the audit, contains multiple references to contact with L. N. Tran, who respondent identifies as “owner” or “taxpayer,” and with L. N. Tran’s CPA. The only reference to appellant in that document is an entry dated July 24, 2020, to the effect that appellant was awarded the Fullerton restaurant in the divorce that was finalized in December 2019.
17. On October 12, 2020, respondent sent a letter to L. N. Tran, addressed to L. N. Tran’s post office box, to inform the recipient regarding the audit findings. In a description of the type of business entity audited, the letter states, “Taxpayer operated as sole proprietorship ([L. N] Tran - owner with ex-spouse as co-owner for most of the audit period)” The letter also indicated that respondent was aware that appellant had been divorced from L. N. Tran since the previous December.
18. The October 15, 2020 NOD was issued to L. N. Tran only and mailed to L. N. Tran’s post office box. The NOD refers to seller’s permit 101-702734, which is the permit issued in 2011 in the name of L. N. Tran only, the same permit that respondent allowed L. N. Tran to use for the Huntington Beach restaurant after it was awarded to him as his separate property. This was the only NOD respondent issued in connection with the liabilities at issue.
19. OTA has no evidence regarding whether respondent has directed any of its collection efforts at L. N. Tran, who did not appeal the NOD.
20. Appellant filed a timely petition for redetermination of the NOD. The petition states that L. N. Tran controlled all financial matters before their divorce and that appellant was not involved in sales and use tax matters until appellant was awarded the Fullerton restaurant in the divorce decree.
21. Appellant also filed a request for innocent spouse relief.⁹ By letter dated April 9, 2021, respondent denied the request, at least in part on the grounds that appellant knew or had reason to know about the liability, as evidenced by the following purported facts:

⁹ As relevant here, a divorced person may request innocent spouse relief from taxes imposed under the Sales and Use Tax Law on the grounds that: (1) the liability is attributable to only the other or former spouse; (2) the requesting spouse did not know about, and had no reason to know about the liability; and (3) taking into account whether or not the other spouse significantly benefited directly or indirectly from the understatement or the nonpayment and taking into account all other facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency. (R&TC, § 6456; Cal. Code Regs., tit. 18, § 35055.)

- In August 2019, respondent sent multiple bank levies and placed a hold on appellant's safe deposit box with Wells Fargo Bank.
 - Appellant was involved in the daily operations of the business during the liability period.
 - In February 2020, collection staff informed appellant that there were delinquent returns and an outstanding liability, and that if account 101-702734 was not brought into compliance, respondent would place a withhold on the Alcoholic Beverage Control liquor license.
 - In March 2020, appellant discussed the liability with respondent's collection staff. During these discussions, appellant stated that she had provided financial information for sales and use tax returns (SUTRs) filed for the account, and agreed to file the delinquent returns and make payment.
 - Appellant continued to operate the Fullerton location for several months after the permit issued to account 101-702734 was closed.
 - Appellant filed the final SUTR for account 101-702734 on May 21, 2020, the same day that appellant obtained her own sole proprietorship account for the Huntington Beach restaurant and filed a SUTR for 1Q20 for that business.
 - Appellant entered into an installment payment agreement to pay the liability remaining on account 101-702734 and subsequently made some payments pursuant to that agreement.¹⁰
22. Appellant did not appeal that denial by requesting an appeals conference with respondent's Appeals Bureau, and respondent's Decision does not address innocent spouse relief. Therefore, innocent spouse relief is not an issue in this appeal.
23. On July 15, 2021, the parties participated in an appeals conference as part of respondent's internal appeals process. In its Decision, respondent found, among other facts, that appellant and L. N. Tran constituted a husband-wife partnership, which operated the

¹⁰ Issues relating to collection of the asserted liability are beyond the scope of this appeal.

restaurants, and that respondent issued the NOD to that partnership. The Decision denied appellant's petition, which it treated as one filed on behalf of a husband-and-wife partnership.

24. This timely appeal followed.

DISCUSSION

Issue 1: Did respondent issue the NOD to appellant or, if it did not, does appellant's timely petition for redetermination constitute a submission to jurisdiction or an assumption of the liability asserted in the NOD?

When respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent 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.) Most sales and use tax appeals involve disputes regarding the amount of tax. When that is the issue, respondent typically has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once it has met that initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) However, before the Office of Tax Appeals (OTA) can address the audit items and measures of each, it must conclude in this appeal that appellant is the taxpayer to whom respondent issued the NOD or that appellant in some manner consented to the assertion of the determined liability against appellant or to the assumption of the liability established by the evidence.

When respondent determines that there is a deficiency, it must give written notice of its determination to the retailer. (R&TC, § 6486.) A notice placed in a sealed envelope, with postage paid, addressed to the retailer at his or her address as it appears in respondent's records is deemed complete at the time of the deposit of the notice with the United States Post Office. (*Ibid.*)

Respondent argues that the permit issued in 2011 for operation of the Fullerton restaurant was a partnership permit issued to a husband and wife. Respondent concedes that it typically issues NODs to partnerships by mailing them to the partnership with copies to the individual partners. While respondent acknowledges that in this instance it issued the NOD in L. N. Tran's

name and asserts that it mailed the NOD to “the retailer’s address of record,” it argues that appellant’s timely petition proves actual and timely notice as required by R&TC section 6486.

Evidence regarding the identity of the retailer who operated the Pho 88 restaurants is inconclusive. There is insufficient evidence to allow OTA to find that appellant and L. N. Tran applied for a seller’s permit to operate Pho 88 restaurant(s) as a husband-and-wife partnership. While appellant and L. N. Tran signed the application for a seller’s permit to operate a restaurant, dba Pho 88, they did not check the box for “married co-ownership.” The permit (101-702734) states on its face that it was issued to L. N. Tran. Appellant’s name does not appear on the permit, and there is no indication on the permit that respondent intended to issue the permit to L. N. Tran as a representative of either appellant or a husband-and-wife partnership.

Respondent conducted the audit with L. N. Tran and his representative, only. L. N. Tran and his representative signed the waivers, all of which indicate that L. N. Tran owned the restaurants as an “individual.”¹¹ Nothing in the audit work papers indicates the involvement of a husband-and-wife partnership or appellant in the ownership or operation of the business before the divorce.¹² Although respondent’s October 12, 2020 letter to L. N. Tran mentions that appellant was a co-owner before the divorce, the weight of the evidence shows that respondent processed the audit as if L. N. Tran was the sole owner and issued the NOD as if L. N. Tran was the only person against whom the liability was asserted.

Furthermore, respondent’s Compliance Policy and Procedures Manual section 301.030 states that if a partner dissociates from a partnership or is otherwise removed and this results in only one partner remaining, the original permit should be closed and a new permit issued for the business. Thus, the fact that respondent allowed L. N. Tran to continue to operate the Huntington Beach restaurant under permit 101-702734 is consistent with respondent viewing that permit as an individual proprietorship permit. Finally, respondent issued the NOD to L. N. Tran only, contrary to respondent’s custom and practice when issuing an NOD to a partnership, and the NOD was mailed to L. N. Tran’s separate post office box in Westminster.¹³ All of this

¹¹ The ownership information on the waiver appears to have been completed by respondent.

¹² The one mention of appellant in the audit work papers occurred during an exit conference after the audit was completed and states only that appellant lost the Fullerton restaurant to appellant in a divorce.

¹³ This is the address that L. N. Tran provided to the auditor in August 2019. The Record Update on which it appears indicates it is L. N. Tran’s mailing address. The “partnership” box on that form is not checked.

evidence indicates that L. N. Tran, not appellant or a husband-and-wife partnership, was the retailer and that this was also how respondent viewed L. N. Tran's role.

Given all of the above, OTA finds that there is insufficient evidence to show that respondent issued the seller's permit for account 101-702734 to a husband-and-wife partnership that included appellant.¹⁴ Furthermore, OTA finds that respondent issued the NOD to L. N. Tran only. While notice defects such as an incorrect address can be cured by a taxpayer's timely petition for redetermination, a voluntary appearance does not automatically constitute a submission to jurisdiction when the petitioner is not the retailer. There is nothing in the evidence to suggest that appellant was agreeing to voluntarily assume liability, and there is nothing in these facts or the law that would require appellant to do so.

Although respondent has not argued that its reasons for denying appellant's request for innocent spouse relief are also reasons to deny appellant's appeal to OTA, respondent submitted a copy of its letter denying innocent spouse relief as evidence in this appeal, so some analysis of that evidence is appropriate. OTA first notes that respondent's denial letter describes and relies on factual assertions, at least some of which are described in general and, at times, conclusory terms, and which are not necessarily established by direct evidence provided to OTA for this appeal. More importantly, though, the factual statements made in the letter do not refute and are not inconsistent with the evidence upon which the above findings are based, and, therefore, they have little bearing on those findings.

Because OTA has answered both questions in Issue 1 in the negative, Issue 2 is now moot.

¹⁴ OTA makes no finding regarding the liability of L. N. Tran.

HOLDING

Respondent did not issue the NOD to appellant, and appellant’s voluntary appearance does not constitute a submission to jurisdiction or an assumption of the liability asserted in the NOD.

DISPOSITION

Because appellant has no direct liability for the deficiency asserted in the NOD, respondent’s action denying appellant’s petition for redetermination is reversed.

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

We concur:

DocuSigned by:
Suzanne B. Brown
47F45ABE69E34D0...
Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Lauren Katagihara
F595B34010D8470...
Lauren Katagihara
Administrative Law Judge

Date Issued: 9/21/2023