

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 220710760
J. PEREZ,)	CDTFA Case IDs: 89-057, 2-525-353
dba The Sandwich Spot)	
)	
)	
)	

OPINION

Representing the Parties:

For Appellant: J. Perez

For Respondent: Mari Guzman, Attorney

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, J. Perez, doing business as The Sandwich Spot, (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ partially denying appellant’s administrative protest of the Notice of Determination (NOD) dated January 8, 2018. The NOD is for a tax liability of \$110,601.08, plus applicable interest, and a negligence penalty for the period July 1, 2014, through June 30, 2017 (liability period).² Since appellant did not pay the tax in full when the liability became final, a penalty was automatically imposed pursuant to R&TC section 6565 (finality penalty). Prior to this appeal, CDTFA

¹ The State Board of Equalization (board) formerly administered sales and use taxes. In 2017, functions of the board relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “CDTFA” shall refer to the board.

² CDTFA timely issued the NOD because appellant did not file the sales and use tax return for the third quarter 2014 until January 9, 2015. Thus, CDTFA issued the NOD within three years from the date appellant filed that return and within three years from the due dates of returns for the remainder of the liability period. (See R&TC, §§ 6487(a), 6488.)

completed a reaudit, which reduced the tax liability from \$110,601.08 to \$72,137, with corresponding reductions to the penalties.³

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, (Regulation) section 30209(a).

ISSUE

Whether CDTFA correctly issued the NOD to appellant.

FACTUAL FINDINGS

1. On April 7, 2010, appellant filed a City of San Carlos Business Registration application (city application) to operate a business known as The Sandwich Spot (the business). On the city application, which appellant signed under penalty of perjury, appellant identified herself as the sole owner of the business.
2. On June 7, 2010, appellant's spouse entered into a Sales Agreement, agreeing to purchase the business from its previous owner. The Sales Agreement did not list appellant as a purchaser of the business.
3. On June 25, 2010, appellant signed a seller's permit application identifying the business. Information on the seller's permit application, including the address of the business, is the same as the information included on the city application. Appellant identified herself as the sole owner of the business. CDTFA issued the seller's permit with an effective start date of July 1, 2010.
4. Appellant opened an account for the business with the California Employee Development Department (EDD). According to CDTFA's decision, appellant held the EDD account from July 1, 2010, through March 31, 2016.
5. Appellant opened merchant accounts for the business with American Express and Paymentech, LLC. Appellant received credit card payments to her accounts from January 2011 through March 2016.

³ On appeal, appellant has not raised any arguments or provided any evidence with respect to the taxable measure or corresponding penalties. The Office of Tax Appeals (OTA) requested clarification from appellant to determine whether the audit was in dispute, but appellant did not respond. As such, OTA finds that the audit calculation and penalties are not in dispute and will not discuss them further.

6. Sales and use tax returns were filed reporting the business's sales to CDTFA using appellant's seller's permit for the entire liability period. The sales and use tax returns identified appellant as "co-owner."
7. Appellant and her spouse filed joint federal income tax returns for the 2013 through 2018 tax years. During the period 2013 through 2015, appellant reported income from the business on federal Form 1040 Schedule C, Profit or Loss from Business (Sole Proprietorship) under her name. During the period 2016 through 2018, appellant's spouse reported income from the business as a sole proprietorship under his name.
8. During the liability period, CDTFA made several telephone calls attempting to contact the business's owner. As relevant here, CDTFA's telephone call logs include an April 8, 2016 telephone call in which appellant explained that her spouse purchased a different business location and moved the business there. In the April 8, 2016 telephone call log, CDTFA documented, for the first time, appellant's statement that her spouse was the business owner. CDTFA informed appellant that if her spouse owned the business then the seller's permit should be in his name.
9. On October 5, 2016, appellant's spouse contacted CDTFA and identified himself as the owner. During additional telephone calls, CDTFA spoke with business employees who denied knowing appellant.
10. Appellant did not surrender her seller's permit. Appellant's spouse did not obtain a seller's permit. According to CDTFA's decision, CDTFA closed appellant's seller's permit effective January 31, 2021, after appellant's spouse informed CDTFA that a new entity, The Sandwich Spot San Carlos LLC, had been formed to operate the business.
11. CDTFA conducted an audit of the business and found an understatement of reported taxable sales of \$1,234,078. On January 8, 2018, CDTFA issued an NOD for a tax liability of \$110,601.08, and applicable interest. CDTFA also imposed a negligence penalty of \$11,060.14.
12. On March 8, 2018, appellant submitted an untimely petition for redetermination, which CDTFA accepted as an administrative protest. CDTFA also imposed a finality penalty because appellant did not pay the tax liability when the NOD became final. CDTFA then conducted a reaudit, which reduced the taxable measure to \$944,700.

13. During the administrative protest, appellant argued that CDTFA issued the NOD to the wrong person because she did not own the business. Appellant also disputed CDTFA's calculation of the audit measure. On October 28, 2021, CDTFA issued a decision finding that appellant was the business's owner and thus liable for the business's unpaid tax liability during the period July 1, 2014, through March 31, 2016. CDTFA also found that appellant was liable for the business's unpaid tax liability during the period April 1, 2016, through December 31, 2016, as its predecessor. Finally, CDTFA concluded that appellant was not liable for the business's unpaid tax liability during the period January 1, 2017, through June 30, 2017, as either the owner or the predecessor.
14. CDTFA conducted a reaudit to remove the taxable measure for January 1, 2017, through June 30, 2017, from appellant's liability. The reaudit further reduced the taxable measure from \$944,700 to \$801,503.
15. This timely appeal followed.

DISCUSSION

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, 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).)

Every person desiring to conduct business as a seller within California must file with CDTFA an application for a seller's permit for each place of business. (R&TC, § 6066(a).) A seller's permit may be held only by persons actively engaging in or conducting a business as a seller of tangible personal property, and any person not so engaged must surrender its permit to CDTFA for cancellation. (R&TC, § 6072; Cal. Code Regs., tit. 18, § 1699(f), (f)(1).) The permitholder has the burden of establishing that CDTFA received notice to cancel the permit. (Cal. Code Regs., tit. 18, § 1699(f)(2).)

A permitholder who fails to surrender its seller's permit upon transfer of the business is liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or

constructive knowledge that the transferee is using the permit in any manner, including filing sales and use tax returns under the permit number. (*Appeal of Pasatiempo Investments, Ltd.*, 2020-OTA-069P; R&TC, § 6071.1; Cal. Code Regs., tit. 18, § 1699(f)(2).) A predecessor's liability is limited to the quarter in which the business is transferred and the three subsequent quarters except where, as relevant here, 80 percent of the real or ultimate ownership of the business remains with the permitholder after the transfer. (R&TC, § 6071.1; Cal. Code Regs., tit. 18, § 1699(f)(3).)

On appeal, appellant argues only that CDTFA issued the NOD to the wrong person. By comparison, during the administrative protest, CDTFA concluded that it correctly issued the NOD to appellant, finding that appellant was liable for the business's unpaid tax liability as the business owner for the period July 1, 2014, through March 31, 2016, and as a predecessor for the period April 1, 2016, through December 31, 2016. Therefore, OTA considers both the periods July 1, 2014, through March 31, 2016, and April 1, 2016, through December 31, 2016, separately.

Here, there is substantial evidence that appellant was the business's owner from July 1, 2014, through at least March 31, 2016. For example, appellant completed a seller's application on June 25, 2010, identifying herself as the sole owner of the business. Based on this information, CDTFA issued a seller's permit to appellant effective July 1, 2010. Additionally, appellant signed and filed the city application as the business owner on April 7, 2010. Appellant also obtained merchant accounts in her name and received credit card payments during the period January 2011 through March 2016. Next, appellant represented herself as an owner of the business in both federal and state tax matters: appellant filed federal income tax returns for the years 2013 through 2015, identifying herself as the business owner; and appellant identified herself as a co-owner on sales and use tax returns filed with CDTFA throughout the liability period.

By comparison, the Sales Agreement identifies appellant's spouse as the purchaser of the business as early as June 7, 2010. Therefore, OTA finds there is some evidence substantiating that appellant's spouse owned the business (as opposed to appellant). OTA notes that CDTFA's telephone call logs provide conflicting information with respect to the business's owner. On the one hand, appellant spoke with CDTFA during the liability period about sales and use tax matters and CDTFA identified appellant as the business's owner during those calls. Indeed,

there is no evidence that appellant identified anyone else as the business's owner until at least April 8, 2016. On the other hand, the available telephone call logs include two conversations in which employees of the business denied knowing appellant. Nevertheless, the purchase agreement and conflicting telephone call logs are insufficient to overcome the evidence establishing that appellant was the business's owner. Instead, when considered together, the weight of the evidence, including appellant's federal income tax returns, sales and use tax returns, the seller's permit application, and the city application, supports a finding that appellant was the owner of the business from April 7, 2010, through at least March 31, 2016. Therefore, OTA finds that appellant is responsible for the business's unpaid tax liability as owner for the period April 7, 2010, through March 31, 2016.

Next, OTA considers whether appellant is responsible for the business's unpaid tax liability as a predecessor for the period April 1, 2016, through December 31, 2016. Here, the available CDTFA telephone call logs indicate that appellant disputed being the business owner for the first time on April 8, 2016. In that conversation, appellant stated that her spouse was the business owner. Appellant transferring the business to her spouse in April 2016 is further supported by the fact that appellant stopped receiving payments from her merchant services account in the previous month (i.e., March 2016). In addition, appellant did not report herself as the owner of the business on her 2016 joint federal income tax return; rather, appellant's spouse listed himself as the sole owner of the business. Therefore, based on the available evidence, OTA finds that appellant transferred the business to her spouse on or about April 1, 2016.

Despite transferring the business, appellant retained her seller's permit, which was used to file sales and use tax returns. A permitholder who fails to surrender its seller's permit upon transfer of the business is liable for any tax, interest, and penalty incurred by the transferee if the permitholder has actual or constructive knowledge that the transferee is using the permit in any manner, including filing sales and use tax returns under the permit number. (*Appeal of Pasatiempo Investments, Ltd., supra*; R&TC, § 6071.1; Cal. Code Regs., tit. 18, § 1699(f)(2).) Here, the evidence shows that appellant failed to surrender her seller's permit upon transferring the business to her spouse. The evidence also shows that appellant's seller's permit was used to file sales and use tax returns for the business and appellant is listed as the returns' preparer for each quarter following the business's transfer. As such, appellant had actual and constructive knowledge that her seller's permit was used for the business because appellant prepared the sales

and use tax returns. Accordingly, appellant is liable for the unpaid tax for the quarter in which the business was transferred and the three subsequent quarters. In this case, that includes the period April 1, 2016, through December 31, 2016.⁴ In her administrative protest, appellant argued that CDTFA could have closed appellant's seller's permit number and created an arbitrary seller's permit account for her spouse. However, appellant (not CDTFA) is responsible for ensuring that the information on the seller's permit is correct. (See R&TC, §§ 6066, 6071.1, 6072; see also Cal. Code Regs, tit. 18, § 1699(f).) OTA finds that appellant is responsible for the business's unpaid tax liability as predecessor for the period April 1, 2016, through December 31, 2016. Based on the foregoing, OTA finds that CDTFA correctly issued the NOD to appellant and that appellant is liable for the business's unpaid tax for the period July 1, 2014, through December 31, 2016.


⁴ Under R&TC, § 6071.1, a predecessor may be held liable for the unpaid liabilities of a business during the quarter in which the business transfer took place and the three subsequent quarters. In this case, appellant transferred the business in 2Q16, and the three subsequent quarters were 3Q16, 4Q16, and 1Q17. Thus, appellant may have been liable for 1Q17. Despite this, CDTFA's decision does not hold appellant responsible for 1Q17. OTA will not disturb CDTFA's decision as it is to appellant's benefit.

HOLDING

CDTFA correctly issued the NOD to appellant.


DISPOSITION

CDTFA’s decision reducing the taxable measure to \$801,503, and also reducing the corresponding penalties, but otherwise denying appellant’s administrative protest, is sustained.


DocuSigned by:

DC88A60D8C3E442...

Keith T. Long
Administrative Law Judge

We concur:

DocuSigned by:

67E043D83FE547C

Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:

8A4294817A67463...

Andrew Wong
Administrative Law Judge

Date Issued: 11/17/2023