OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **V. GALUSTYAN AND** **A. BADALYAN**[1]	OTA Case No. 230112423 CDTFA Case ID: 2-199-334

OPINION

Representing the Parties:

For Appellant: Lusy Brutyan, EA

For Respondent: Mari Guzman, Attorney

For Office of Tax Appeals: Corin Saxton, Attorney

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6538.5, A. Badalyan (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)[2] partially denying appellant's July 19, 2020 application for an administrative hearing to protest a Notice of Jeopardy Determination (jeopardy determination) dated June 30, 2020, for the period June 15, 2019, through December 31, 2019 (liability period). The jeopardy determination is for tax of $90,733, plus applicable interest, a failure-to-file penalty of $9,077.25, and a $9,077.25 penalty pursuant to R&TC section 6591 for failing to pay or appeal the jeopardy determination before it became final (finality penalty).

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

[1] As discussed below, respondent determined that V. Galustyan and A. Badalyan operated as a partnership, and respondent issued separate Notices of Jeopardy Determination to each individual. Only appellant A. Badalyan has filed this appeal. As A. Badalyan claims that she was not a member of the partnership, this Opinion refers to A. Badalyan as appellant, rather than the partnership.

[2] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" shall refer to the board.

ISSUES

1. Whether appellant is liable as a partner.
2. Whether appellant has shown that further adjustments are warranted to the audited taxable measure.
3. Whether appellant has shown reasonable cause to relieve the failure-to-file penalty or finality penalty.

FACTUAL FINDINGS

1. On August 16, 2019, respondent conducted a field visit to the storefront located at 6809 Woodman Avenue in Van Nuys, California. Upon entering the storefront and speaking to employees therein, respondent determined that the storefront was a cannabis dispensary. During the field visit, respondent observed a paper sign on the storefront window advertising the dispensary's Instagram handle as "mainspot420." Respondent also observed posted business hours of 10:00 a.m. to 2:00 a.m.[3] Respondent accessed a Weedmaps profile for "Main Spot,"[4] which listed the 6809 Woodman Avenue address and hours of 10:00 a.m. to 12:00 a.m.
2. On September 3, 2019, respondent conducted a second field visit and observed that the business was open on this date.
3. By letter dated October 18, 2019, the dispensary's landlord provided respondent with a copy of the lease. The lease names appellant and V. Galustyan as tenants for a two-year term commencing June 15, 2019. Respondent also obtained information from the Los Angeles Department of Water and Power (DWP) showing that appellant opened a utility account for the business location under her name.
4. Based on the lease and DWP information, respondent determined that appellant and V. Galustyan owned and operated the dispensary.
5. Appellant did not have a seller's permit and respondent requested appellant to provide records for the audit. Because no records were provided upon audit, respondent

[3] It is unclear from the record how the business hours were posted. Respondent's notes from the field visit simply state "Hours: Daily 10am-2am."

[4] Weedmaps.com is an online platform providing consumers with information regarding cannabis products and listings of local cannabis retailers.

performed an outside observation test of the business on October 8, 2019, October 9, 2019, and October 15, 2019.

6. Respondent observed an average of 9.75 customers entered the business per hour, which respondent multiplied by 14 hours to estimate average daily sales of 136.5. Based on its experience auditing the cannabis industry in Los Angeles County, respondent estimated an average purchase amount per customer of $35, which respondent used to calculate average daily sales of $4,777.50 (136.5 average daily sales x $35 average purchase amount).

7. Based on the June 15, 2019 lease start date, respondent determined that the business was only open for 16 days in the second quarter of 2019 (2Q19).[5] Respondent multiplied the average daily sales of $4,777.50 by 200 days of operation in the liability period (16 days for 2Q19, 92 days for 3Q19, and 92 days for 4Q19), to establish audited taxable sales of $955,500 for the liability period.

8. Respondent also obtained a May 5, 2020 Los Angeles Police Department (LAPD) arrest report, which listed appellant as a suspect and detailed LAPD's execution of a search warrant at the dispensary on May 5, 2020. According to the arrest report, LAPD executed a search warrant on the business on May 5, 2020, at 5:00 p.m., and during the search appellant told LAPD that she was the owner of the location and that it had been open for several months. During the search, LAPD searched appellant's purse and found a notebook containing sales information for cannabis sales. During the search, appellant opened a safe for LAPD, which contained twelve large bags of cannabis. Additionally, LAPD interviewed two employees of the business during the search, and both employees stated that appellant hired them.

9. Based on the foregoing, respondent determined that V. Galustyan and appellant formed a partnership to operate the dispensary,[6] and on June 30, 2020, respondent issued a

[5] Although respondent's decision states that the audit used 15 days for 2Q19, the audit working papers show 16 days for 2Q19.

[6] Respondent issued a jeopardy determination to V. Galustyan on June 18, 2020, for $90,773 tax, plus accrued interest, a 10 percent failure-to-file penalty of $9,077.25, and a finality penalty of $9,077.25. V. Galustyan did not appeal this jeopardy determination. By Notice of Collection Fee dated September 11, 2020, addressed to V. Galustyan only, respondent imposed a collection cost recovery fee of $950, pursuant to R&TC section 6833(a).

jeopardy determination to appellant for $90,773 tax, plus accrued interest, a 10 percent failure-to-file penalty of $9,077.25, and a finality penalty of $9,077.25.[7]

10. On July 19, 2020, appellant filed a timely application for an administrative hearing pursuant to R&TC section 6538.5, disputing the jeopardy determination on her individual behalf.
11. On April 4, 2022, respondent issued a decision that ordered a reaudit to recalculate unreported taxable sales by reducing: (1) the average number of customers observed per hour by 15 percent, and (2) the number of days in the liability period by 62 days to account for a start date of August 16, 2019 (the date of respondent's field visit).
12. On May 9, 2022, respondent completed the reaudit, making the adjustments ordered in the decision and reduced unreported taxable sales from $955,500 to $560,402.
13. On July 29, 2022, appellant filed a request for reconsideration, and respondent issued a supplemental decision on December 1, 2022, ordering the liability redetermined in accordance with the reaudit but otherwise denying the application for an administrative hearing.
14. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant is liable as a partner.

A partnership is an association of two or more persons to carry on as co-owners of a business for profit, whether or not the persons intend to form a partnership. (Corp. Code, §§ 16101(a)(9), 16202(a).) In determining whether a partnership exists, one looks to the intention of the parties to carry on a definite business as co-owners, and such intention may be determined from the terms of the parties' agreement, or from surrounding circumstances. (*Greene v. Brooks* (1965) 235 Cal.App.2d 161, 165-66.) A partnership is not required to be formed in writing. (*Calada Materials Co. v. Collins* (1960) 184 Cal.App.2d 250, 253.) Further, it is immaterial if the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts. (*Constans v. Ross* (1951) 106

[7] Although the record only contains the first page of the jeopardy determination issued to appellant, it is apparent from the jeopardy determination issued to V. Galustyan that the penalties imposed on appellant consist of a failure-to-file penalty of $9,077.25 and a finality penalty of $9,077.25. As discussed below, it was premature of respondent to include the finality penalty in the jeopardy determination.

Cal.App.2d 381, 386; *Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740.) Participating to some degree in the business's management is a primary element in partnership organization, and it is virtually essential to a determination that such a relationship existed. (*Billups v. Tiernan* (1970) 11 Cal.App.3d 372, 379.) Once a partnership is shown to exist, it is presumed to continue until the contrary is shown and the burden of proof is upon the person who asserts its termination. (*Asamen v. Thompson* (1942) 55 Cal.App. 2d 661, 668-669). Generally, partners are liable jointly and severally for all obligations of the partnership. (Corp. Code, § 16306.)

Appellant argues that she is not liable as a partner because she did not enter into a partnership agreement or operate the business. Appellant asserts that she was just a friend of V. Galustyan and that she co-signed the business's lease as a favor to V. Galustyan, whose credit was poor. In support of this argument, appellant provided a document entitled "Letter of Agreement" dated August 9, 2019, between her and V. Galustyan, in which V. Galustyan purports to assume full responsibility for the dispensary's operation and finance. In addition, appellant asserts that she was unaware of the audit because she did not have access to the business and, in response to a family emergency, had to leave the country during the liability period. In support of this argument, appellant provided photos of pages from a passport, which is purportedly hers, depicting three passport admission stamps for Armenia dated November 10, 2019, December 9, 2019, and January 10, 2020. Appellant also asserts that she cancelled the business's utility service when she had to leave the country, and in support of this argument, appellant submitted a September 25, 2019 closing bill from DWP. With respect to the police report, appellant asserts that the police report is not probative because it was created after the liability period and because appellant has not been found guilty of any felonies in connection with the operation of the business.[8]

Here, appellant co-signed a lease and opened a utility account for the dispensary location, which is indicative of appellant's intent to carry on the business as a co-owner. Furthermore, appellant identified herself to the LAPD as an owner and operator of the business during the LAPD's search of the premises; appellant knew the safe combination and possessed a sales notebook; and two employees told the LAPD that appellant hired them. Taken together, these

[8] Appellant provided an August 4, 2020 Proof of Appearance form with the Los Angeles Superior Court, showing that no charges were filed.

facts show that appellant was a co-owner of the business, and appellant's arguments to the contrary are unpersuasive.

The arrest report's probative value is not diminished by the fact that it was executed after the liability period, nor is the probative value impacted by the fact that charges were not subsequently filed. Moreover, regardless of any purported agreement between appellant and V. Galustyan, the arrest report disproves appellant's argument that V. Galustyan bore sole responsibility for the dispensary's operation. With respect to appellant's reliance on the utility statement, it is unclear how this evidence supports appellant's position. Given that the business was open when the search warrant was executed, it appears that the business's utility account remained open. Furthermore, while appellant asserts that the business needed to close during her absence, this assertion actually supports respondent's assertion that appellant was a co-owner of the business. As for appellant's purported absence from the business during a family emergency, even if accepted as true,[9] given the possibility that appellant either delegated her responsibilities while she was gone or fulfilled them remotely, this purported absence does not tend to show that appellant's co-ownership in the business ceased.

Based on the foregoing, the Office of Tax Appeals (OTA) finds that appellant is jointly and severally liable as a partner for the tax at issue.

Issue 2: Whether appellant has shown that further adjustments are warranted to the audited taxable measure.

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).)

If 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

[9] It is unclear from the pictures whether the passport pages are from appellant's passport.

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, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b); *Appeal of Estate of Gillespie*, 2018-OTA-052P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Gorin*, 2020-OTA-018P)

Here, appellant failed to maintain or provide any records to support reported amounts, as required by law. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) In the absence of supporting documentation from appellant, respondent computed an estimated liability based on three factors: (1) an estimated average purchase amount per patron based on respondent's experience with comparable businesses; (2) an estimated number of patrons per hour based on respondent's observations of appellant's business; and (3) the number of hours the business operated, based on information provided to or obtained by respondent. In a different appeal involving a cannabis dispensary that failed to maintain or provide adequate records, OTA concluded that the above approach (three-factor method) was reasonable and rational. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Therefore, OTA finds that using this three-factor method to estimate taxable sales (based on patrons observed per hour, an average estimated purchase price, and hours of operation) is a reasonable and rational method for purposes of meeting respondent's initial burden to establish underreported taxable sales by the cannabis dispensary in the absence of records.

Respondent also made some additional facts-and-circumstances-based adjustments to the three-factor method: respondent reduced the taxable measure by 15 percent to account for potential errors from the observation test, and respondent reduced the liability period by changing the start date from June 15, 2019, to August 16, 2019 (the date of respondent's field visit). These adjustments resulted in a reduction of $395,098 to the deficiency measure. OTA finds that use of the three-factor method, including the facts and circumstances-based adjustments, was reasonable and rational. Accordingly, appellant has the burden of establishing that further adjustments are warranted.

Appellant argues that respondent should not have used the information on the Weedmaps website to estimate operational hours because "Main Spot" is listed as the name of the business on Weedmaps, while the actual name of the business, appellant asserts, was "Bald Eagle." Furthermore, appellant argues that the Weedmaps printout is unreliable because it states that the business was closed at the time of the printout. Appellant questions whether there was a different dispensary that operated at the business's address before the business at issue here began operating, and appellant suggests that if a different dispensary did operate at the address, the information in the Weedmaps printout could pertain to that other business. Additionally, appellant notes that respondent has not provided a picture of the sign respondent observed during respondent's visit, and appellant questions whether the business hours listed on the sign were 10:00 a.m. to 2:00 p.m., rather than 10:00 a.m. to 2:00 a.m.

With respect to appellant's implication that respondent might have misread the business's hours of operation sign, it seems highly unlikely that the business's sign listed a closing time of 2:00 p.m., given that the business was open when the search warrant was executed at 5:00 p.m., and given the fact that appellant previously asserted that the business hours varied from 10:00 a.m. to 6:00 p.m. and 10:00 a.m. to 8:00 p.m. Furthermore, OTA finds appellant's arguments regarding the Weedmaps profile for "Main Spot" lack merit. Although the Weedmaps printout states "Closed Now," this merely indicates that the website was accessed outside the hours of operation. Additionally, while appellant argues that "Bald Eagle" was the name of the business, this argument is contradicted by the sign respondent observed during the field visit, which advertised a "mainspot420" Instagram handle. Given that the Instagram handle and the business address match the name and address shown on the Weedmaps profile, OTA finds the hours listed on the Weedmaps profile constitute the best evidence available for the business's hours of operation. Consequently, OTA finds that appellant has failed to provide a valid basis for further reductions to the deficiency measure.

Issue 3: Whether appellant has shown reasonable cause to relieve the failure-to-file penalty or finality penalty.

If a person fails to make a return, respondent shall make an estimate of the tax required to be paid to the state, adding to the sum determined a penalty equal to 10 percent thereof (commonly known as a failure-to-file penalty). (R&TC, § 6511.) If the amount of a jeopardy determination is not paid within 10 days after service of notice, the amount becomes final at the

expiration of the 10 days, unless a petition for redetermination (including the required payment of security) is filed within 10 days, and the 10 percent delinquency penalty provided in R&TC section 6591 is applied. (R&TC, §§ 6537, 6538.) This penalty is commonly called a finality penalty.

Relief of the failure to file and finality penalties may be granted where the failure to file the return or make a timely payment was due to reasonable cause and circumstances beyond the taxpayer's control, and occurred notwithstanding the taxpayer's exercise of ordinary care and in the absence of willful neglect. (R&TC, § 6592(a).) A taxpayer seeking relief from such a penalty must file a statement signed under penalty of perjury setting forth the facts upon which the request for relief is based. (R&TC, § 6592(b).)

With respect to the failure-to-file penalty, appellant did not obtain a seller's permit and has filed no sales and use tax returns. Therefore, respondent applied a 10 percent failure-to-file penalty to the jeopardy determination. OTA finds the failure-to-file penalty is applicable. As for the finality penalty, respondent included the finality penalty in the jeopardy determination issued to appellant, despite the fact that the determination had yet to become final. Although respondent's inclusion of the finality penalty in the jeopardy determination was premature, there is no dispute that the tax amount specified in the jeopardy determination was not paid or petitioned within 10 days after service of the notice. Therefore, OTA finds the finality penalty is applicable.

Appellant states that she is in disagreement with the failure-to-file penalty and finality penalty; however, appellant has not articulated a reasonable cause basis for relief of the penalties pursuant to R&TC section 6592, and, consequently, OTA finds no basis for relief.

HOLDINGS

1. Appellant is liable as a partner.
2. Appellant has not shown that further adjustments are warranted to the audited taxable measure.
3. Appellant has not shown reasonable cause to relieve the failure-to-file or finality penalty.

DISPOSITION

Respondent's action in reducing the tax liability from $955,500 to $560,402, but otherwise denying the application for administrative hearing, is sustained.

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Susana Seyller
6FE2EBECC6F6481...

For
Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Michael F Geary
1A9B52EF88AC4C7...

Michael F. Geary
Administrative Law Judge

Date Issued: 5/22/2024