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**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	CASE NO. 16-33437-HDH11
	§	
TPP ACQUISITION, INC.	§	Chapter 11
	§	
DEBTOR.	§	Hearing Date: July 11, 2019
	§	

**RESPONSE AND SUPPORTING BRIEF TO LIQUIDATION TRUSTEE’S FOURTH
OMNIBUS OBJECTION TO THE PRIORITY CLAIM OF THE CALIFORNIA
DEPARTMENT OF TAX AND FEE ADMINISTRATION (CLAIM NO. 468)**

The California Department of Tax and Fee Administration (“CDTFA”), formerly known as State Board of Equalization, respectfully submits its response to the fourth omnibus claims objection filed by the Liquidating Trustee [Docket No. 739].

The Liquidating Trustee’s argument that the CDTFA’s \$40,983.71 priority tax claim is untimely is without merit. The claim at issue is not a priority tax claim. The debtor-in-possession, TPP Acquisition, Inc. d/b/a The Picture People (“Debtor”), was required to report and pay taxes payable by reason of the November 3, 2016, Section 363 sale of assets [Docket No. 355].

Failure to do so gives rise to an administrative expense tax claim.



The CDTFA asserted administrative expense status long before the administrative claim bar date. The Liquidating Trustee had two (2) years' notice of the CDTFA's administrative expense claim. The Liquidating Trustee does not assert that the administrative expense itself is improperly calculated.

BACKGROUND

1. Debtor registered with the CDTFA as a California retailer in March 2011. Cal. Rev. & Tax. Code § 6066. Debtor was assigned California retail seller's permit number SR Y OHC 102-058194.

2. Debtor reported and paid its California sales and use taxes. Sales of tangible personal property in California are subject to sales tax. The sales tax also applies to the sale of a business. *Hotel Del Coronado Corp. v. State Bd. of Equalization*, 15 Cal. App. 3d 612, 620 (1971); California Code of Regulations, title 18, § 1595(b) (gross receipts include cash, notes, other property as well as indebtedness assumed).

3. This sales tax obligation for asset sales remains unchanged in bankruptcy. *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 852 (1989).

4. On September 2, 2016, Debtor filed its petition for relief under Chapter 11. At the inception of this Chapter 11 filing, Debtor scheduled its tangible personal property on its Schedule "B" [Docket No. 137].

5. On November 3, 2016, the Court issued its *Order Granting the Debtor's Motion, Pursuant to Bankruptcy Code Sections 105(a), 363, and 365, and Bankruptcy Rules 2002, 6004, and 6006, for Entry of an Order Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests and Granting Related Relief* (the "Sale Order").

6. The Sale Order approved the sale of the Debtor's assets pursuant to the terms and conditions of the Asset Purchase Agreement by and among Debtor, and purchaser TPP Holdings, LLC, dated as of September 2, 2016 (the "APA").

7. The APA, Art. XI (Taxes), provides for the seller and purchaser to prepare tax returns, and pay any "sales, use, purchase, transfer, franchise, deed, fixed asset, stamp, documentary stamp, use or other Taxes and recording charges which may be payable by reason of the sale of the Purchased Assets or the assumption of the Assumed Liabilities under this Agreement or the transactions contemplated hereby."

8. To date, Debtor and purchaser have failed to report the California sales tax consequences of the tangible personal property in the asset sale.

9. Since sale closing, the purchaser designated various executory contracts and unexpired leases for assumption and assignment. As a business subject to California sales tax, the purchaser registered with the CDTFA in November 2016.

10. On April 20, 2017, the Court entered its *Order (I) Finally Approving Second Amended Disclosure Statement and (II) Confirming Second Amended Joint Chapter 11 Plan of Liquidation of the Debtor and the Committee Under Chapter 11 of the Bankruptcy Code* (the "Confirmation Order").

11. For post-petition claims, the administrative claim bar date was June 26, 2017, and the post-petition tax claim deadline was July 10, 2017 [Docket No. 565].

12. On June 5, 2017, the CDTFA filed Proof of Claim No. 460 in the amount of \$42,328.01. The CDTFA estimated the taxability of the sale of business machinery and equipment as \$36,582. In addition, the last operating Fourth Quarter 2016 return was short \$103.31, and was late-filed.

13. On July 31, 2017, the CDTFA filed an Amended Proof of Claim No. 468 in the reduced amount of \$40,983.20. The CDTFA waived a \$1,344.81 late filing penalty.

14. On May 15, 2019, the Liquidating Trustee filed the instant claim objection. The Liquidating Trustee contends that Proof of Claim No. 468 is a “Late-Filed/No-Liability Tax Claim,” because “On November 8, 2016, the Buyer acquired substantially all of the Debtor’s assets, and assumed operations of the Debtor’s business. This claim appears to be for a period after that date. To the extent it is not, it was filed after the applicable bar date.”

**THE CDTFA’S ADMINISTRATIVE EXPENSE TAX CLAIM WAS TIMELY FILED,
THUS FULL DISALLOWANCE ON TIMELINESS GROUNDS IS NOT PROPER**

15. A tax calculation is presumed correct, and the burden of proof to prove otherwise is with the taxpayer. *People v. Schwartz*, 31 Cal. 2d 59, 64 (1947). This burden remains unchanged in bankruptcy. *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 24-25 (2000).

16. The Liquidating Trustee has not asserted any substantive objection to the CDTFA’s calculations.

17. The CDTFA’s administrative expense claim is timely, and legitimately grounded in the APA.

CONCLUSION

The parties have been in discussions. The Liquidating Trustee’s objection to Proof of Claim No. 468 should be overruled.

Respectfully submitted,

Dated: June 27, 2019

/s/ Joan S. Huh
JOAN S. HUH
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CERTIFICATE OF SERVICE

I am employed by the California Department of Tax and Fee Administration, and I hereby certify that a copy of the foregoing was served on June 27, 2019, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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The foregoing documents have been served on all other parties receiving ECF notice in this case through the Court's ECF notification system on June 27, 2019.

/s/ Tammi Hupp
TAMMI HUPP