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NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP Nos. EC-09-1120-MoJmK  
 )  
 CHERYL LEE ROGERS, )  
 ) Bk. No. 05-37891-TCH  
 )  
 Debtor. )  
 )  
 )  
 EMPLOYMENT DEVELOPMENT )  
 DEPARTMENT, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM**<sup>1</sup>  
 )  
 CHERYL LEE ROGERS, )  
 )  
 Appellee. )

Argued and Submitted on November 20, 2009  
at Sacramento, California

Filed - January 29, 2010

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Before: MONTALI, JURY and MARKELL, Bankruptcy Judges.

Appellant, the California Employment Development Department  
("EDD") appeals an order disallowing its claim against Debtor-

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellee, Cheryl Rogers (née Hunt) ("Rogers"), for penalties and  
2 interest on unemployment taxes the EDD asserts she owes in  
3 connection with a construction business in which she was a  
4 partner with her brother Gary Hunt ("Gary") and her father  
5 Wendell Hunt ("Wendell"). For the following reasons, we REVERSE  
6 and REMAND for further proceedings.

## 7 I. FACTS

### 8 A. Prepetition Background.

9 Gary and Wendell formed a general partnership,  
10 W&G Construction ("W&G"), under a partnership agreement dated  
11 June 1, 1984. On or about January 1, 1987, by "verbal agreement"  
12 Rogers became an equal partner of W&G, sharing in one-third of  
13 the profits and losses. W&G formally dissolved on  
14 October 9, 1992. After that, Gary owned W&G as a sole  
15 proprietorship which continued to employ Rogers as a bookkeeper  
16 and clerical worker.<sup>2</sup>

17 After conducting an audit, the EDD levied four notices of  
18 assessment against W&G in July 1996, for unpaid unemployment  
19 taxes. One assessment for \$355,914.21, the assessment at issue  
20 on this appeal, was against W&G partnership and partners Gary,  
21 Wendell, and Rogers (collectively "the Petitioners") alleging  
22 their involvement in a cash payment scheme with subcontractors to  
23 avoid paying employment taxes during the period of

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24  
25 <sup>2</sup> Prior to oral argument, Rogers disputed that she was ever  
26 a partner of W&G although several items in the record, such as  
27 the partnership dissolution agreement and Rogers's deposition  
28 testimony, revealed that she was a partner of W&G prior to  
October, 1992. At oral argument, Rogers's counsel finally  
conceded this fact.

1 January 1, 1989, to September 30, 1992. Rogers was included  
2 because the EDD determined from the partnership dissolution  
3 agreement, bank records, tax returns, and other documents that  
4 she was a partner of W&G during this time period. The other  
5 three assessments were levied against Gary and the W&G sole  
6 proprietorship for not withholding taxes from the wages of four  
7 clerical workers, including Rogers, and casual laborers that the  
8 EDD alleged were employees as opposed to independent contractors  
9 between October 1, 1992, and December 31, 1995.

10 On August 6, 1996, attorney Phillip Gibbons ("Gibbons")  
11 filed a "Petition for Reassessment" before the California  
12 Unemployment Insurance Appeals Board ("CUIAB") on the  
13 Petitioners' behalf to dispute all four of the EDD's assessments.  
14 In opposition, the EDD asserted that its assessments were correct  
15 and should be upheld.<sup>3</sup> All four assessments were consolidated  
16 for hearing and decision.

17 A two-day hearing was held before administrative law judge  
18 ("ALJ") Peter Barbosa, on March 17 and 18, 1998.<sup>4</sup> Gibbons,  
19 Rogers, Gary, Michael Schenck ("Schenck"), auditor for the EDD,  
20 and the EDD's counsel, Gordon Ohanesian ("Ohanesian"), attended  
21 the hearing. The focus on the first day was the alleged cash  
22 payment scheme. On the hearing's second day, the parties entered

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23 <sup>3</sup> On page 3 of the EDD's answer it noted that prior to  
24 October 1992, W&G was a "three way partnership" and that Rogers  
25 was considered to be an employee after she was no longer  
considered a partner in W&G.

26 <sup>4</sup> The transcript and recording of the ALJ hearing has long  
27 ago been destroyed. However, the parties' post-hearing briefs  
and the ALJ's decision are part of the record.

1 into an oral stipulation, which was read into the record by the  
2 ALJ, that two of the four office workers, including Rogers, would  
3 be considered "employees." The parties further stipulated that  
4 certain casual laborers would also be considered employees.  
5 Essentially, the parties split the difference on the employee vs.  
6 independent contractor issue.

7 Each side filed a closing argument brief post-hearing.  
8 Gibbons listed Rogers as a petitioner in his brief. The only  
9 mention of Rogers in the EDD's brief is found in fn. 4, which  
10 refers to Rogers as Gary's sister, "a cleric[al] work[er] in his  
11 office," and states that "she merely followed [Gary's] payment  
12 directions and that if there were a cash payment scheme, she  
13 would have had no opportunity to observe it." In other words,  
14 the EDD did not consider Rogers a culpable party in the cash  
15 scheme. In fact, it concedes that Rogers was assessed only  
16 because she was a partner of W&G.

17 The ALJ issued a written decision (the "Decision") on  
18 July 6, 1998, finding several individuals liable on the cash  
19 payment scheme (including Gary), and holding that the "petitioner  
20 [sic] for reassessment" was denied "except for those portions  
21 stipulated to by the Department and the [P]etitioners ...." The  
22 first sentence of the Decision's "Statement of Facts" states:  
23 "The Petitioners Gary D. Hunt and W&G Construction hereinafter  
24 referred to as sole proprietorship and Gary D. Hunt,  
25 Wendell Hunt, and W&G Construction, hereinafter referred to as  
26 partnership ...." Rogers is not listed in the "definition" of  
27 W&G partnership; the only reference to Rogers is in regard to the

1 stipulation by the parties that she was an "employee," but the  
2 Decision is silent as to any specific period of time. The  
3 Decision notes that W&G was a partnership during the period from  
4 January 1, 1989, to September 31 [sic] 1992, and was a sole  
5 proprietorship owned by Gary after that. In light of the  
6 Decision and stipulation, the EDD implemented tax adjustments to  
7 reflect that two of the four office workers were independent  
8 contractors.

9 On behalf of the Petitioners, Gibbons timely appealed the  
10 Decision to the Appeals Board of the CUIAB. Gibbons did not list  
11 Rogers in the definition of "Petitioners" in the appeal brief.  
12 The EDD's response brief contended that the ALJ carefully  
13 considered all of the evidence and applicable law, that the  
14 Decision was well-supported by the record, and that it must be  
15 upheld. The Appeals Board denied the Petitioners' appeal on  
16 February 23, 2000, and the Decision was affirmed.

17 In September 2000, the EDD began collection efforts against  
18 Rogers, Gary, Wendell and W&G on the partnership assessment by  
19 issuing a Notice of State Tax Lien. In response, on  
20 October 4, 2000, Robert P. Dudugjian ("Dudugjian"), new counsel  
21 for the Petitioners, sent a letter to EDD auditor Schenck stating  
22 that although Rogers and Wendell were included as petitioners in  
23 the partnership assessment, the Decision did not include them  
24 individually and thus the EDD could not proceed against "these  
25 partners" unless they were included in the Decision, citing

1 Cal. Corp. Code §§ 16201 and 16307(c).<sup>5</sup> He further requested  
2 that the EDD "release the tax liens against [Rogers and  
3 Wendell]." Dudugjian sent a follow-up letter to EDD counsel  
4 Ohanesian on December 4, 2000, contending that although Gibbons  
5 had represented all four of the Petitioners in the Petition for  
6 Reassessment and subsequent appeal, the Decision did not find  
7 Rogers or Wendell liable.<sup>6</sup> Neither of Dudugjian's letters  
8 contended that Rogers was not liable for the partnership's  
9 unemployment taxes because the parties had stipulated that she  
10 was an employee.

11 Between 2001 and 2003, the EDD continued collection efforts  
12 against the Petitioners, including wage garnishments against  
13 Rogers and levies on her bank accounts. Various conversations  
14 regarding those collection efforts have taken place between  
15 Rogers and EDD representatives. The EDD has also recorded a tax  
16 lien.

17 In 2001, Rogers, Gary, and Wendell, on behalf of W&G, filed  
18 claims for tax refunds. When Rogers could no longer afford an  
19 attorney to fight the EDD, she enlisted the help of Carolyn  
20 Peterson ("Peterson"), an enrolled agent, in or around  
21 March, 2003.

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22 <sup>5</sup> Cal. Corp. Code § 16201 provides: "A partnership is an  
23 entity distinct from its partners."

24 Cal. Corp. Code § 16307(c) provides: "A judgment against a  
25 partnership is not by itself a judgment against a partner. A  
26 judgment against a partnership may not be satisfied from a  
partner's assets unless there is also a judgment against the  
partner."

27 <sup>6</sup> We assume the EDD sent response letters, but they are not  
28 in the record.

1 In 2005, Peterson informed the EDD's Taxpayer's Advocates  
2 Office that the 1998 stipulation before the ALJ released Rogers  
3 from all liability. Upon Peterson's assertion, the Taxpayer's  
4 Advocate's Office read the Decision and determined that Rogers's  
5 interpretation was incorrect; she was still liable as a partner.  
6 It is disputed as to exactly when the EDD learned of Rogers's  
7 position that she was absolved from all liability.

8 **B. Postpetition Facts and Procedural History.**

9 Rogers filed a chapter 13 petition<sup>7</sup> on October 15, 2005.  
10 A chapter 13 plan was confirmed by the bankruptcy court.

11 On April 10, 2006, the EDD filed a proof of claim in the  
12 amount to \$546,573.28 - with \$183,895.77 asserted as unsecured  
13 priority, and \$362,677.51 asserted as unsecured nonpriority.<sup>8</sup>  
14 Rogers filed an objection to the EDD's claim, contending that,  
15 inter alia, the EDD had previously stipulated that Rogers was not  
16 liable for any tax claim and that the EDD was bound by the  
17 stipulation. She further contended that perhaps the EDD had  
18 levied assessments against her in the past because she "carried  
19 the last name Hunt." The EDD filed an opposition.

20 On July 24, 2007, Rogers moved for summary judgment arguing  
21 that, as a matter of law, the stipulation determining her to be  
22 an employee as opposed to a partner vitiated any assessments made

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23 <sup>7</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et. seq.  
25 seq. as enacted and promulgated before the effective date of The  
26 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23.

27 <sup>8</sup> The EDD also filed "Claim 4" but it was later withdrawn as  
28 duplicative.

1 against her and, thus, the EDD had no claim. She contended, and  
2 the EDD conceded, that a person cannot be an employee of a  
3 partnership yet at the same time be a partner; the two theories  
4 are legally inconsistent. The EDD filed an opposition to  
5 Rogers's motion and a response to her Statement of Undisputed  
6 Facts and various declarations. In sum, the EDD's position was  
7 that it never intended to release Rogers from liability as a  
8 partner of W&G nor could it have waived such a large claim.  
9 Further, it believed that the Decision was ambiguous as to  
10 whether she was considered an employee during the entire  
11 assessment period or just during the time in which W&G was a sole  
12 proprietorship and, if it was the latter, then she was liable for  
13 the partnership assessment based on her partner status.

14 On September 5, 2007, the bankruptcy court denied Rogers's  
15 motion. It determined that the Decision and, in particular, the  
16 stipulation, were ambiguous with respect to her partner status,  
17 and ruled that parol evidence was necessary to determine the  
18 parties' intent. The court further noted that perhaps some  
19 theory of preclusion or estoppel applied, binding the parties to  
20 the stipulation, but neither side raised the issue.

21 On December 20, 2007, the bankruptcy court issued a  
22 pre-trial order trifurcating the matter into three phases:  
23 (1) the meaning of the Decision with regard to Rogers's partner  
24 status ("Phase I"), and (2) if the Decision was not preclusive on  
25 the issue, whether, and if so for what period of time, she was a  
26 partner of W&G ("Phase II"), and (3) if the Decision was not



1 preclusive on the issue, whether Rogers was estopped from  
2 asserting that she was not a partner of W&G for any period of  
3 time ("Phase III").

4 A trial on Phase I was held on January 16, 2008, with  
5 closing argument presented on January 17, 2008. Gibbons  
6 testified that the stipulation was that Rogers was an employee  
7 and not a partner for purposes of the tax determination, yet the  
8 Decision determined that liability against the "employer" was  
9 sustained. He further testified that the stipulation meant that  
10 Rogers was "off the hook." However, Gibbons also testified that  
11 he did not recall any specific discussion with respect to whether  
12 Rogers was or was not a partner. Schenck testified that no  
13 discussions ever took place on whether Rogers was or was not a  
14 partner of W&G, and that all the stipulation meant was that  
15 Rogers was an employee, as opposed to an independent contractor,  
16 during the period in which W&G was a sole proprietorship; there  
17 was never any stipulation that Rogers would be relieved of  
18 liability because she was not considered a partner of W&G.

19 On April 2, 2008, the bankruptcy court issued an oral ruling  
20 on Phase I determining that even though Rogers was a partner of  
21 W&G during the period from January 1, 1999 [sic] to  
22 September 30, 1992, the Decision held that Rogers was not a  
23 partner of W&G at any of the time periods covered by the  
24 consolidated assessments, and such Decision was final and not  
25 subject to collateral attack. This determination was "compelled"  
26 by the fact that Rogers's name was not included in the definition  
27 of "petitioners" for the partnership in the Decision's opening

1 paragraph, and this omission supported the parties' stipulation,  
2 of which no time limitation was imposed, that Rogers was an  
3 employee and not a partner of W&G. The court further concluded  
4 that the only evidence presented before the ALJ as to Rogers's  
5 partner status was the listing of her name in the partnership  
6 assessment, and this fact combined with Gary's testimony as to  
7 Rogers's innocence in the cash payment scheme "likely led ALJ  
8 Barbosa to conclude that EDD was conceding that Rogers had  
9 erroneously been assessed as a partner."

10 A further hearing took place on April 16, 2008. In light of  
11 the bankruptcy court's ruling on Phase I, the EDD articulated  
12 that it was unclear as to whether any further issues, such as  
13 estoppel, were precluded from determination. The court opined  
14 that Phase I did not necessarily dispose with all issues, and the  
15 EDD was free to file any motions it wished to have determined.  
16 The EDD also contended that Rogers's liability flowed not from  
17 the Decision but from the assessment, which is now a judgment  
18 lien under California law that became final in 1999<sup>9</sup> - an  
19 alternate theory (the "lien theory") for liability essentially  
20 "trumping" the Decision.

21 On April 28, 2008, the EDD filed a brief requesting a ruling  
22 on the Phase II and Phase III issues. It asked the bankruptcy  
23 court to find that Rogers was a partner of W&G, which it believed  
24 was not inconsistent with court's ruling that the Decision held  
25 that she was not a partner. In other words, issue preclusion did  
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27 <sup>9</sup> The EDD also asserted (and confirmed at oral argument)  
28 that the assessment became final on September 18, 2000.

1 not prevent the bankruptcy court from making its own  
2 determination on Rogers's partner status. Alternatively, the EDD  
3 asked the court to find that Rogers was estopped from asserting  
4 that she was not a partner of W&G. For this claim, the EDD  
5 contended that because Rogers continued to assert herself as a  
6 partner to the EDD until 2005, when she then changed her position  
7 that she was absolved from any tax liability based on her status  
8 as "employee" under the stipulation, the EDD relied on her  
9 assertions to its detriment because the time to appeal or clarify  
10 the Decision had run long ago.

11 Rogers filed an opposition contending that the EDD had  
12 previously abandoned its estoppel theory, or, if not, then its  
13 theory was nonmeritorious because the EDD knew as early as  
14 October 2000 (via Dudugjian's letter) that Rogers interpreted the  
15 Decision to mean that she was not liable because she was an  
16 "employee." Rogers further contended that the bankruptcy court  
17 already determined that the Decision held she was not a partner  
18 of W&G.

19 At the August 26, 2008 hearing on Phases II and III, the  
20 bankruptcy court determined that the matter would be deemed  
21 submitted. The court issued its decision on Phases II and III  
22 via Civil Minutes on March 26, 2009, ruling that Rogers's  
23 objection to the EDD's claim was sustained, the claim was  
24 disallowed in its entirety, and Rogers was not estopped from  
25 asserting that she was not a partner of W&G. As to Phase II, the  
26 bankruptcy court analyzed the five elements of issue preclusion  
27 under California law and determined that each element was either

1 met or not disputed by the parties; thus the Decision was  
2 preclusive on whether Rogers was ever a partner of W&G - she was  
3 not.<sup>10</sup> As to Phase III, the court determined that the EDD's  
4 estoppel claim failed because it met only one of the five  
5 necessary elements. The court did not address the EDD's  
6 alternative lien theory argument. A Civil Minute Order  
7 consistent with this decision was entered on March 26, 2009.  
8 The EDD timely appealed.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.  
11 § 157(b) (2) (B) and § 1334. We have jurisdiction under 28 U.S.C.  
12 § 158.

## 13 **III. ISSUES**

- 14 1. Did the bankruptcy court err in interpreting the Decision to  
15 mean that Rogers was not a partner?
- 16 2. Did the bankruptcy court err when it determined that issue  
17 preclusion applied to the Decision?
- 18 3. Did the bankruptcy court abuse its discretion when it  
19 refused to apply equitable estoppel to prevent Rogers from  
20 asserting she was not a partner?
- 21 4. Did the bankruptcy court misapply California law regarding  
22 final tax assessments?

## 23 **IV. STANDARD OF REVIEW**

24 The bankruptcy court's findings of fact are reviewed for  
25 clear error and its conclusions of law are reviewed de novo.

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26  
27 <sup>10</sup> We note that in its Phase I ruling, the bankruptcy court  
28 found that Rogers was a partner of W&G, but in Phase II the court  
stated that Rogers was allegedly a partner of W&G.

1 Emery v. World Sav. & Loan Ass'n (In re Emery), 317 F.3d 1064,  
2 1069 (9th Cir. 2003).

3 We review de novo the preclusive effect of a judgment; the  
4 issue presents a mixed question of law and fact in which the  
5 legal questions predominate. The Alary Corp. v. Sims  
6 (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554  
7 (9th Cir. BAP 2002).

8 We review the bankruptcy court's decision whether to  
9 apply the equitable estoppel doctrine for an abuse of discretion.

10 Heath v. Am. Express Travel Related Servs. Co., Inc.

11 (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005) (citing  
12 Hoefler v. Babbit, 139 F.3d 726, 727 (9th Cir. 1998)). We follow  
13 a two-part test to determine objectively whether the bankruptcy  
14 court abused its discretion. U.S. v. Hinkson, 585 F.3d 1247,  
15 1263 (9th Cir. 2009). First, we determine de novo whether the  
16 bankruptcy court identified the correct legal rule to apply to  
17 the relief requested. Id. If it did, we next determine whether  
18 the bankruptcy court's application of the correct legal standard  
19 to the evidence presented was "(1) 'illogical,' (2) 'implausible,'  
20 or (3) without 'support in inferences that may be drawn from the  
21 facts in the record.'" Id. If any of these three apply, we may  
22 conclude that the court abused its discretion by making a clearly  
23 erroneous finding of fact. Id.

## 24 V. DISCUSSION

### 25 A. **The Bankruptcy Court Erred When It Determined That The** 26 **Decision Held That Rogers Was Not A Partner Of W&G.**

27 The EDD argues that the bankruptcy court disregarded the  
28 parties' intent as to the stipulation but rather relied on errors

1 or omissions within the Decision, giving particular significance  
2 to its omission of Rogers as a petitioner and that no time  
3 limitation was imposed as to her "employee" status, to  
4 erroneously conclude that the Decision held Rogers was not a  
5 partner of W&G.

6 It is undisputed that Rogers was a partner of W&G from  
7 June 1987 to September/October 1992. The bankruptcy court found  
8 this fact in its Phase I ruling. Likewise, it is undisputed that  
9 Rogers was an employee of W&G once it became a sole  
10 proprietorship in October 1992.

11 The first day of the hearing before the ALJ focused on the  
12 alleged cash payment scheme. During the hearing's second day,  
13 the parties briefly convened outside of court and entered into an  
14 oral stipulation that two of the four office workers, including  
15 Rogers, and certain casual laborers would be considered  
16 employees. The ALJ read the stipulation into the record. As  
17 previously noted, a person cannot be simultaneously a partner and  
18 an employee of a partnership. Therefore, under the premise that  
19 these two legal concepts are mutually exclusive, the bankruptcy  
20 court presumably determined that since the Decision considered  
21 Rogers an employee she could therefore not be a partner. The  
22 critical fact to the court was the Decision's silence as to  
23 "when" Rogers was an employee. Considering that the four  
24 assessments were consolidated into one hearing and one decision,  
25 the bankruptcy court interpreted this silence, when combined with  
26 the fact that Rogers was not identified as a partner or a  
27 petitioner, to conclude that the Decision determined Rogers was

1 not a partner during any time period. This conclusion was  
2 erroneous.

3 We review the bankruptcy court's interpretation of the  
4 Decision de novo. In re Emery, 317 F.3d at 1069. We interpret  
5 the Decision to mean that Rogers was considered an employee, as  
6 opposed to an independent contractor, with respect to the sole  
7 proprietorship assessments, and that during the time W&G was a  
8 partnership Rogers was not a party to the cash payment scheme -  
9 nothing more, nothing less. Nowhere does the Decision expressly  
10 state that Rogers was not a partner of W&G. The Decision's  
11 omission of her partner status, when combined with the parties'  
12 testimony that her partner status was never discussed, supports  
13 our interpretation. It is illogical to conclude that the parties  
14 stipulated that Rogers was an employee during the time period of  
15 all four assessments when no one can remember ever discussing her  
16 partner status. Gibbons, Schenck, and Ohanesian necessarily  
17 would have discussed that issue if the intent was to release  
18 Rogers from all liability.

19 The court further erred when it concluded that, because the  
20 only evidence presented before the ALJ as to Rogers's partner  
21 status was the listing of her name in the partnership assessment,  
22 and because she was innocent in the cash payment scheme, these  
23 facts "likely led ALJ Barbosa to conclude that EDD was conceding  
24 that Rogers had erroneously been assessed as a partner." Not  
25 only is this factually incorrect because there was substantial  
26 evidence that Rogers was a partner, but it erroneously concludes  
27 that because Rogers was not culpable in the cash payment scheme

1 she could not be liable for the partnership tax debt. Under  
2 California law, partners in a general partnership (unlike limited  
3 partners in a limited partnership) are personally liable, jointly  
4 and severally, for partnership debts, obligations, and  
5 liabilities. Cal. Corp. Code § 16306(a); § 16305(a).<sup>11</sup> As such,  
6 Rogers's innocence is irrelevant for these purposes.

7 **B. The Bankruptcy Court Erred When It Determined That Issue**  
8 **Preclusion Applied To The ALJ Decision.**

9 **1. CUIAB/ALJ Decisions Are Afforded Preclusive Effect**  
10 **Under California Law.**

11 California law recognizes that issue preclusion (collateral  
12 estoppel) may be applied to decisions made by administrative  
13 agencies. Pac. Lumber Co. v. State Water Res. Control Bd.,  
14 37 Cal. 4th 921, 944 (2006) (citing People v. Sims, 32 Cal. 3d  
15 468, 479 (1982)); Castillo v. City of Los Angeles, 92 Cal. App.  
16 4th 477, 481 (2001) ("Issue preclusion is not limited to barring  
17 relitigation of court findings. It also bars the relitigating of  
18 issues which were previously resolved in an administrative  
19 hearing by an agency acting in a judicial capacity.").

20 For an administrative decision to have collateral estoppel  
21 effect, it and its prior proceedings must possess a judicial  
22 character. Pac. Lumber Co., 37 Cal. 4th at 944. "Indicia of

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23 <sup>11</sup> Cal. Corp. Code § 16306(a) provides: "Except as otherwise  
24 provided ... all partners are liable jointly and severally for  
all obligations of the partnership unless otherwise agreed by the  
claimant or provided by law."

25 Cal. Corp. Code § 16305(a) provides: "A partnership is  
26 liable for loss or injury caused to a person, or for a penalty  
27 incurred, as a result of a wrongful act or omission, or other  
actionable conduct, of a partner acting in the ordinary course of  
28 business of the partnership or with authority of the  
partnership."



1 proceedings undertaken in a judicial capacity include a hearing  
2 before an impartial decision maker; testimony given under oath or  
3 affirmation; a party's ability to subpoena, call, examine, and  
4 cross-examine witnesses, to introduce documentary evidence, and  
5 to make oral and written argument; the taking of a record of the  
6 proceeding; and a written statement of reasons for the decision.”  
7 Id. See also Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817,  
8 828-30 (9th Cir. BAP 2006) (discussion by a federal court on when  
9 non-judicial proceedings, such as arbitration, can be afforded  
10 preclusive effect under California law).

11 At the hearing before the ALJ, an impartial decision maker,  
12 the parties called, examined and cross examined witnesses who  
13 provided testimony under oath. The parties also introduced  
14 evidence and made oral and written arguments. The hearing was  
15 recorded and transcribed, and the ALJ issued a written decision  
16 giving the reasons for it. Clearly, the prior administrative  
17 proceeding meets the test set forth in Pac. Lumber Co.  
18 Therefore, it was proper for the bankruptcy court to afford  
19 collateral estoppel effect to the Decision, and we reject the  
20 EDD's argument to the contrary.

## 21 **2. The Bankruptcy Court's Application Of Issue Preclusion** 22 **In Phase II.**

23 The purpose of issue preclusion is to foreclose litigation  
24 of issues that have already been decided. Paine v. Griffin  
25 (In re Paine), 283 B.R. 33, 39 (9th Cir. BAP 2002). In order to  
26 analyze whether issue preclusion applies, the federal court must  
27 look to the law of the state in which the judgment was entered.  
28 Molina v. Seror (In re Molina), 228 B.R. 248, 250 (9th Cir. BAP  
1998).

1 The elements necessary to invoke issue preclusion under  
2 California law are: (1) the issue sought to be precluded from  
3 relitigation is identical to that decided in the former  
4 proceeding; (2) the issue was actually litigated in the former  
5 proceeding; (3) the issue was necessarily decided in the former  
6 proceeding; (4) the decision in the former proceeding is final  
7 and on the merits; and (5) the party against whom preclusion is  
8 sought is the same as, or in privity with, the party to the  
9 former proceeding. Pac. Lumber Co., 37 Cal. 4th at 943. In  
10 applying these five elements to the Decision, the bankruptcy  
11 court concluded that all were met and/or not disputed by the  
12 parties. We disagree, and conclude that only two of the five  
13 required elements were met, thus negating any application of  
14 issue preclusion.

15 **a. Element 1: "Identical Issue"**

16 As to this element, the bankruptcy court stated that the  
17 issue before it was whether and when Rogers was a partner of W&G,  
18 and this identical issue was litigated before the ALJ. Clearly,  
19 since the stipulation deemed Rogers an employee, the bankruptcy  
20 court inferred that the issue of her partner status was therefore  
21 before, and determined by, the ALJ, thus satisfying element (1).

22 "Identical issue" addresses "whether 'identical factual  
23 allegations' are at stake in the two proceedings, not whether the  
24 ultimate issues or dispositions are the same." Lucido v.  
25 Super. Ct., 51 Cal. 3d 335, 342 (1990) (quoting People v. Sims,  
26 32 Cal. 3d at 485). The identity between the issues raised in  
27 the present suit and those adjudicated in the prior action cannot

1 be uncertain, indefinite, or based upon inferences. Glen Oak,  
2 Inc. v. Henderson, 258 Ga. 455, 458 (Ga. 1988); Day v. Kerkorian,  
3 61 Mass. App. Ct. 804, 809 (2004) ("Issue preclusion is not  
4 available where there is ambiguity concerning the issues, the  
5 basis of decision, and what was deliberately left open by the  
6 judge.").

7 Although the EDD did not address element (1) directly in its  
8 opening brief, we disagree with the bankruptcy court that the  
9 issue sought to be precluded here - whether and when Rogers was a  
10 partner of W&G - is identical to the issue before the ALJ. The  
11 issues before the ALJ were: whether the partners/partnership (and  
12 other parties) were involved in the cash payment scheme; whether  
13 certain clerical workers, including Rogers, were employees or  
14 independent contractors of the sole proprietorship; and whether  
15 certain casual laborers were employees or independent contractors  
16 of the sole proprietorship. Further, the parties admit that  
17 Rogers's partner status "never came up" or was "never discussed,"  
18 so it is uncertain that it was determined.

19 **b. Elements 2 and 3: "Actually Litigated" and**  
20 **"Necessarily Decided"<sup>12</sup>**

21 As to these elements, the bankruptcy court stated that the  
22 issue of Rogers's partner status was actually and necessarily  
23 litigated in the ALJ proceeding and that neither the EDD nor  
24 Rogers disputed this point. Further, it reasoned that a  
25 determination of the Petition for Reassessment required findings  
26 regarding whether Rogers was an employee or a partner of W&G and,

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27 <sup>12</sup> Since the bankruptcy court combined these elements in its  
28 analysis, we address them together.

1 since the ALJ made that determination, elements (2) and (3) were  
2 met.

3 An issue is "actually litigated" for purposes of issue  
4 preclusion if it is properly raised in the pleadings or otherwise  
5 submitted for determination and in fact determined. People v.  
6 Sims, 32 Cal. 3d at 484. For an issue to have been "necessarily  
7 decided" under California law, the issue must "not have been  
8 'entirely unnecessary' to the judgment in the initial  
9 proceeding." Lucido, 51 Cal. 3d at 342.

10 The EDD contends that Rogers's partner status was never  
11 litigated in the prior proceeding, nor was there any need to  
12 determine her partner status because the Petition for  
13 Reassessment did not assert it as a basis for challenging the  
14 partnership assessment against her. We agree.

15 First, the bankruptcy court incorrectly believed that no one  
16 disputed this point; the EDD absolutely disputed this point. In  
17 any event, as to element (2), there is nothing in the record to  
18 support that Rogers's partner status was actually litigated. In  
19 fact, the parties agree that her partner status never came up.  
20 If the partnership issue was never even discussed, it follows  
21 that it could not have been actually litigated. Thus, the  
22 bankruptcy court erred when it concluded that element (2) was  
23 satisfied.

24 As to element (3), the bankruptcy court erred in reasoning  
25 that a determination of the Petition for Reassessment required  
26 findings regarding whether Rogers was an employee or a partner of  
27 W&G. The only determinations necessary by the ALJ were whether

1 Rogers and others were employees or independent contractors when  
2 W&G was a sole proprietorship, and whether Rogers, her fellow  
3 partners, and W&G partnership were involved in the cash payment  
4 scheme. Her status as partner was "entirely unnecessary" as to  
5 the first determination, and no such finding was necessary at all  
6 as to the second because undisputedly she was a partner.

7 **c. Element 4: "Final and on the Merits"**

8 On this element, the bankruptcy court reasoned that since  
9 the ALJ issued a Decision after hearing the matter of whether  
10 Rogers was a partner and concluded that she was not, this  
11 constituted a decision on the merits. As to finality, the court  
12 noted that the EDD itself acknowledged that after the Appeals  
13 Board denied the Petitioners' appeal on February 23, 2000,  
14 collection efforts began "sometime in 2001" after the Decision  
15 was final. Further, the court noted, that neither party disputed  
16 this issue. Therefore, element (4) was satisfied.

17 A decision is "on the merits" when the substance of the  
18 issue is tried and determined. Burdette v. Carrier Corp.,  
19 158 Cal. App. 4th 1668, 1682 (2008). A "final" decision  
20 "includes any prior adjudication of an issue in another action  
21 that is determined to be sufficiently firm to be accorded  
22 conclusive effect." Border Bus. Park, Inc. v. City of San Diego,  
23 142 Cal. App. 4th 1538, 1564 (2006) (quoting Restatement (Second)  
24 Judgments § 13 (1982)).

25 Neither party contends on appeal that the prior proceeding  
26 was not on the merits. However, the EDD contends the Decision is  
27 not final. It further contends that if the CUIAB rules against a

1 taxpayer, as it did here, the taxpayer must pay the tax before he  
2 or she can pursue any further challenge, and that the ruling does  
3 not bar a subsequent court challenge in a post-payment suit for  
4 refund.

5 The EDD cites nothing specifically holding that ALJ  
6 decisions (or appeals) are not final for purposes of issue  
7 preclusion. Further, the issue here is not about Rogers pursuing  
8 a refund claim, so we do not accept this argument. Finally,  
9 California Unemployment Insurance Code § 1224 ("CUIC") states  
10 that ALJ decisions or appeals on tax assessment determinations  
11 are "final 30 days after service upon the petitioner of notice of  
12 the order or decision."

13 In any event, the EDD's argument here is not persuasive and  
14 we agree with the bankruptcy court that the Decision was final  
15 for purposes of issue preclusion.

16 **d. Element 5: "Same Parties"**

17 There is no dispute that the parties in the administrative  
18 proceeding are the same parties involved in this matter. Thus,  
19 element (5) was satisfied.

20 **e. Disposition Of The Issue.**

21 Because the bankruptcy court erred when it determined that  
22 the Decision was preclusive on the Phase II issue of whether or  
23 when Rogers was a partner of W&G, we REVERSE.

24 **C. The EDD's Claim Of Equitable Estoppel.**

25 Because we reverse the bankruptcy court's decision on the  
26 collateral estoppel issue, we need not address the issue of  
27 equitable estoppel.

1 **D. We Cannot Determine Whether The Bankruptcy Court Misapplied**  
2 **California Law Governing The Effect Of Final Tax**  
3 **Assessments.**

4 The EDD contends that regardless of the bankruptcy court's  
5 interpretation of the Decision, it still has a claim against  
6 Rogers in the form of a tax lien, which equates to a judgment  
7 lien. In other words, once the assessment became "final" under  
8 CUIC § 1224, and unpaid, per CUIC § 1703(a)<sup>13</sup> Rogers's tax  
9 liability became a perfected and enforceable judgment lien,  
10 irrespective of what the Decision held. However, the EDD  
11 admitted at oral argument that the predicate to a tax lien under  
12 § 1703 is an ALJ decision (if the petitioner appeals), so if the  
13 decision determines that a petitioner is absolved from liability,  
14 then the EDD obviously could not obtain a tax lien. We have  
15 determined that Rogers was a partner, that the Decision did not  
16 conclusively determine this issue, and thus she could be liable  
17 for the partnership assessment per the Decision.<sup>14</sup> Therefore, if

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18 <sup>13</sup> In conjunction with § 1224, CUIC § 1703 provides in  
19 relevant part:

20 (a) If any employing unit or other person fails to pay any  
21 amount imposed under this division at the time that it  
22 becomes due and payable, the amount thereof, including  
penalties and interest, together with any costs, shall be a  
perfected and enforceable state tax lien.

23 (b) For purposes of this section, amounts are "due and  
payable" on the following dates:

24 (4) ... the date the assessment is final.

25 <sup>14</sup> Rogers contends that the EDD did not raise this issue (or  
26 present any evidence to support its position) before the  
bankruptcy court that it now contends on appeal. We disagree.  
27 This argument was addressed (perhaps ambiguously) in the EDD's  
Phase II/Phase III opening statement and closing argument, in  
28 (continued...)

1 the EDD has a valid tax lien, then full faith and credit requires  
2 the bankruptcy court to honor that lien and its claim against  
3 Rogers. The bankruptcy court did not address the EDD's lien  
4 theory in its Phase II/Phase III ruling, so it is unclear whether  
5 it considered it.

6 The parties dispute when or if the assessment became  
7 "final." To determine finality in this case, we look to  
8 CUIC § 1224(b) since there was a further appeal of the Decision.  
9 It states:

10 (b) In the event of an appeal to the appeals board, it may  
11 decrease or increase the amount of any assessment involved.  
12 In cases where an order or decision of the appeals board  
13 requires an adjustment of an assessment by granting a  
14 portion of a petition or by increasing an assessment, the  
15 order or decision and the assessment become final 30 days  
16 after service upon the petitioner by the director of a  
17 statement of amounts due setting forth the adjusted  
18 liability pursuant to the order or decision of the appeals  
19 board. **In all other cases, the order or decision of the  
20 appeals board and any assessment become final 30 days after  
21 service upon the petitioner of notice of the order or  
22 decision** (emphasis added).

17 Rogers contended at oral argument that she was never served  
18 with notice by the EDD of the adjusted amounts after the appeal  
19 to the Appeals Board, in violation of CUIC § 1224(b), so the  
20 assessment never became final, and thus the EDD's subsequent tax  
21 lien was improper. The EDD contended that under CUIC  
22 § 1224(a) (2)<sup>15</sup> Rogers received requisite notice of the

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24 <sup>14</sup> (...continued)  
25 fn. 15 of its Phase II/Phase III trial brief, and raised to an  
26 extent at the April 16, 2008 hearing, thus sufficiently  
27 preserving it for appeal.

27 <sup>15</sup> Section 1224(a) (2) provides:

(continued...)



1 post-Decision adjusted amounts via the DE-2176,<sup>16</sup> in response to  
2 which Rogers called the EDD, objected to the amounts, and  
3 informed the EDD of the Petitioners' appeal to the Appeals Board.

4 Notice under CUIC § 1224(a)(2) is not relevant here since  
5 there was an appeal to the Appeals Board, which triggers the  
6 notice requirements under CUIC § 1224(b). Thus, this argument is  
7 unavailing.

8 However, Rogers is also incorrect. Under CUIC § 1224(b),  
9 service of notice of the adjusted amounts by the EDD is only  
10 required where "an order or decision of the appeals board  
11 requires an adjustment of an assessment." Here, the Appeals  
12 Board denied the Petition for Reassessment and affirmed the  
13 Decision in its entirety; there were no further adjustments to  
14 the assessment. In appeals cases where there are no adjustments  
15 to the assessment, i.e., "all other cases," for it to become  
16 final Rogers only had to be served with notice of "the order or  
17 decision of the appeals board" and presuming she did in fact  
18 receive such notice, the assessment became final within 30 days  
19 upon notice. The Appeals Board issued its decision on

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21 <sup>15</sup>(...continued)

22 Any assessment involved is final at the expiration of the  
23 period except that in cases where a decision of the  
24 administrative law judge requires an adjustment of an  
25 assessment by granting a portion of a petition or by  
26 increasing an assessment, the assessment is final 30 days  
after service upon the petitioner by the director of  
a statement of amounts due setting forth the adjusted  
liability pursuant to the decision.

27 <sup>16</sup> The DE-2176 is a statement sent by the EDD to employers  
28 informing them of their tax liability. This statement is not in  
the record.

1 February 23, 2000. Presuming notice was sent out on that date,  
2 the initial assessment (which Rogers does not dispute she  
3 received), form DE-2176, became final on March 25, 2000. Without  
4 explanation, the EDD contends that it became final on  
5 September 18, 2000, and it filed its tax lien on  
6 September 26, 2000.

7 There is nothing in the record to conclude one way or the  
8 other whether Rogers received notice of the Appeals Board's  
9 decision. All we know is that the EDD issued its Notice of Tax  
10 Lien on September 26, 2000, which does not answer the "finality"  
11 question.

12 Moreover, even if the assessment is final, we are unsure  
13 what it means. The EDD claims it has recorded a tax lien, but we  
14 do not know against whom or where the lien has been recorded.  
15 The EDD further contends that a final tax assessment is the  
16 equivalent of a judgment lien against Rogers, citing  
17 Wilkinson v. Wilkinson, 51 Cal. App. 3d 382, 391 (1975) (citing  
18 Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc.,  
19 14 Cal. 3d 742, 749-50 (1975)). Both of these cases were decided  
20 at a time when CUIC § 1703 stated that a tax lien "has the force,  
21 effect and priority of a judgment lien." Id. CUIC § 1703 has  
22 been amended several times since 1975, and no longer includes the  
23 words "judgment lien." See fn. 13. Thus, the EDD appears to  
24 support its position with an obsolete statute. On the other  
25 hand, Cal. Code Civ. P. § 668.020 authorizes the EDD to issue  
26 warrants for unpaid tax liabilities and "use any of the remedies  
27

1 available to a judgment creditor"<sup>17</sup> in order to collect the  
2 liability. Therefore, perhaps the EDD is correct. In any event,  
3 all of this uncertainty requires us to REMAND this issue to the  
4 bankruptcy court for determination.

5 If the EDD holds a final tax lien that establishes Rogers's  
6 personal liability, there is little for the bankruptcy court to  
7 do other than enter an order allowing the EDD's claim. If that  
8 is not the case, the bankruptcy court can consider any defenses  
9 available to Rogers.

## 10 VI. CONCLUSION

11 The bankruptcy court incorrectly determined that Rogers's  
12 partner status had been decided by the ALJ Decision, and thus the  
13 Decision was preclusive on the issue. We REVERSE that  
14 determination because the Decision did not hold that Rogers was  
15 not a partner of W&G and, further, only two of the five required  
16 elements of issue preclusion were satisfied. Moreover, because  
17 we cannot conclude whether notice under CUIIC § 1224(b) was  
18 proper, or if the EDD has a judgment lien, or whether Rogers has  
19 any other defenses against the EDD's claim, we REMAND this issue  
20 for the bankruptcy court to determine.

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27 <sup>17</sup> Cal. Code Civ. P. § 688.040 defines "judgment creditor"  
28 as "the state or the department or agency of the state seeking to  
collect the liability."