NOT FOR PUBLICATION

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.	**M E M O R A N D U M**[1]
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-

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[1] 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.

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

I. FACTS

A. Prepetition Background.

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

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

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

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

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

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

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

[4] The transcript and recording of the ALJ hearing has long ago been destroyed. However, the parties' post-hearing briefs and the ALJ's decision are part of the record.

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

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

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

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

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

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

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

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

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

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[5] Cal. Corp. Code § 16201 provides: "A partnership is an entity distinct from its partners."

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

[6] We assume the EDD sent response letters, but they are not in the record.

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

B. Postpetition Facts and Procedural History.

Rogers filed a chapter 13 petition[7] on October 15, 2005. A chapter 13 plan was confirmed by the bankruptcy court.

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

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

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[7] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et. seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et. seq. as enacted and promulgated before the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[8] The EDD also filed "Claim 4" but it was later withdrawn as duplicative.

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

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

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

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

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

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

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

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

On April 28, 2008, the EDD filed a brief requesting a ruling on the Phase II and Phase III issues. It asked the bankruptcy court to find that Rogers was a partner of W&G, which it believed was not inconsistent with court's ruling that the Decision held that she was not a partner. In other words, issue preclusion did

[9] The EDD also asserted (and confirmed at oral argument) that the assessment became final on September 18, 2000.

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

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

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

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

II. JURISDICTION

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

III. ISSUES

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

IV. STANDARD OF REVIEW

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

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[10] We note that in its Phase I ruling, the bankruptcy court 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.

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

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

We review the bankruptcy court's decision whether to apply the equitable estoppel doctrine for an abuse of discretion. Heath v. Am. Express Travel Related Servs. Co., Inc. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005)(citing Hoefler v. Babbit, 139 F.3d 726, 727 (9th Cir. 1998)). We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009). First, we determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested. Id. If it did, we next determine whether the bankruptcy court's application of the correct legal standard to the evidence presented was "(1)'illogical,' (2)'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. If any of these three apply, we may conclude that the court abused its discretion by making a clearly erroneous finding of fact. Id.

V. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Bankruptcy Court's Application Of Issue Preclusion In Phase II.

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

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

a. Element 1: "Identical Issue"

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

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

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

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

b. Elements 2 and 3: "Actually Litigated" and "Necessarily Decided"[12]

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

[12] Since the bankruptcy court combined these elements in its analysis, we address them together.

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Element 5: "Same Parties"

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

e. Disposition Of The Issue.

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

C. The EDD's Claim Of Equitable Estoppel.

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

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

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

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[13] In conjunction with § 1224, CUIC § 1703 provides in relevant part:

> (a) If any employing unit or other person fails to pay any amount imposed under this division at the time that it becomes due and payable, the amount thereof, including penalties and interest, together with any costs, shall be a perfected and enforceable state tax lien.
>
> (b) For purposes of this section, amounts are "due and payable" on the following dates:
>
> (4) ... the date the assessment is final.

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

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

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

> (b) In the event of an appeal to the appeals board, it may decrease or increase the amount of any assessment involved. In cases where an order or decision of the appeals board requires an adjustment of an assessment by granting a portion of a petition or by increasing an assessment, the order or decision and the assessment become 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 order or decision of the appeals board. **In all other cases, the order or decision of the appeals board and any assessment become final 30 days after service upon the petitioner of notice of the order or decision** (emphasis added).

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

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[14](...continued)
fn. 15 of its Phase II/Phase III trial brief, and raised to an extent at the April 16, 2008 hearing, thus sufficiently preserving it for appeal.

[15] Section 1224(a)(2) provides:

(continued...)

post-Decision adjusted amounts via the DE-2176,[16] in response to which Rogers called the EDD, objected to the amounts, and informed the EDD of the Petitioners' appeal to the Appeals Board.

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

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

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[15](...continued)
Any assessment involved is final at the expiration of the period except that in cases where a decision of the administrative law judge requires an adjustment of an assessment by granting a portion of a petition or by 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.

[16] The DE-2176 is a statement sent by the EDD to employers informing them of their tax liability. This statement is not in the record.

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

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

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

available to a judgment creditor"[17] in order to collect the liability. Therefore, perhaps the EDD is correct. In any event, all of this uncertainty requires us to REMAND this issue to the bankruptcy court for determination.

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

VI. CONCLUSION

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

[17] Cal. Code Civ. P. § 688.040 defines "judgment creditor" as "the state or the department or agency of the state seeking to collect the liability."