OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case Nos. 18042580, 18042581
NEWPORT JEWELERS BY GABE ARIK CORP.	Date Issued: March 26, 2019

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Steve Mather, Esq.
For Respondent:	Kevin C. Hanks, Chief, Headquarters Operations Bureau
For Office of Tax Appeals:	Richard Zellmer Business Taxes Specialist III

KWEE, Administrative Law Judge: On November 16, 2017, the State Board of Equalization (board or BOE) voted to grant appellant's untimely petition for redetermination (which the board accepted as an administrative protest)[1] and related claims for refund filed by Newport Jewelers by Gabe Arik Corp. (appellant).[2] The California Department of Tax and Fee Administration (CDTFA) timely filed a petition for rehearing (PFR) on March 23, 2018. We conclude there is good cause to grant a rehearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the

[1] Under regulations promulgated by the board and applicable at the time the petition was filed, if a taxpayer files a petition for redetermination after the 30-day time period specified in Revenue and Taxation Code (R&TC) section 6561, the board may accept it as an administrative (late) protest. (Cal. Code Regs, tit. 18, § 5220.)

[2] The Notice of Determination subject to the late protest was dated July 25, 2012, in the amount of $627,099.41 in tax, plus interest and penalties, for the period January 1, 2009, through December 31, 2012. The claims for refund are in the total amount of $390,310.30, which includes $55,524.03 in interest, $20,435.12 in penalties, plus $304,351.15 in tax. The difference represents concessions by the California Department of Tax and Fee Administration.

proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to the decision; (4) insufficient evidence to justify the decision or the decision is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs, tit. 18, § (Regulation or Reg.) 30820 [replaced by Regulation 30604, effective January 3, 2019];[3] *Appeal of Do*, 2018-OTA-002P, Mar. 22, 2018; *Appeal of Wilson Development, Inc*., 94-SBE-007, Oct. 5, 1994.)[4] A ground for a rehearing is material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764; *Trovato v. Beckman Coulter, Inc*. (2011) 192 Cal.App.4th 319.)

CDTFA disputes both of the board's actions and contends there was insufficient evidence to justify the board's decisions or the decisions are contrary to law. Additionally, CDTFA contends that the board erroneously "rush[ed] to judgment in order to avoid the matter being referred to OTA." Here, we understand CDTFA to separately contend that an irregularity in the appeals process prevented a fair consideration of the appeal.

The board decided the underlying cases as follows. First, with respect to the late protest (OTA Case # 18042580), the board decided to delete the entire liability as determined, which included: (1) underreported taxable sales; (2) disallowed claimed nontaxable sales for resale; and (3) disallowed claimed exempt sales in interstate commerce. Second, with respect to the refund claims (OTA Case # 18042581), the board decided that appellant timely filed claims for refund for all the payments made on the liability. Appellant contends that both of the board's decisions are fully supported by the evidence because the board discussed all the relevant issues at the hearing.

As provided in the board's precedential decision in *Appeal of Wilson Development, Inc., supra*, and as reflected in the board's Rules for Tax Appeals, the board has historically looked to Code of Civil Procedure, section 657, for guidance in determining whether grounds for a

[3] All subsequent "regulation" and "reg." references are to title 18 of the California Code of Regulations.

[4] The board's precedential opinions are viewable on its website: <http://www.boe.ca.gov/legal/legalopcont.htm>. OTA's precedential decisions are available for viewing online: <https://ota.ca.gov/opinions>

rehearing exist. (See, e.g., Regs. 5461(c)(5), 5561(a).)[5] OTA's precedential decision in *Appeal of Do*, *supra*, and OTA's regulations, reflect that OTA adopted the board's established precedent of looking to Code of Civil Procedure section 657, and the applicable caselaw, as guidance in determining whether the applicable ground for granting a rehearing has been satisfied. (See Regs. 30602(c)(5) [franchise or income tax appeals prior to January 3, 2019], 30820 [business tax appeals prior to January 3, 2019], 30604 [appeals filed on and after January 3, 2019].)

First, the standard for reviewing a decision for insufficiency of the evidence provides that a rehearing should not be granted unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that a different decision should have been reached. (Code Civ. Proc., § 657.)

Second, the standard for reviewing a decision as contrary to law does not involve a weighing of the evidence, but instead requires an analysis of whether the decision is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) The relevant question is not over the quality or nature of the reasoning behind the decision, but whether the decision can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.*, 2010-SBE-001, Nov. 17, 2010.)

Third, an irregularity in the proceedings warranting a rehearing would generally include any departure from the due and orderly method of conducting the appeals proceedings by which the substantial rights of a party have been materially affected. (See *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) The granting or denial of a new hearing on such basis "is largely in the discretion of the" presiding officer. (*Loggie v. Interstate Transit Co*. (1930) 108 Cal.App. 165, 171.)

I. Timeliness of the PFR

As a preliminary matter, appellant contends that CDTFA had 30 days from the date of the oral hearing before the board (i.e., until December 16, 2017) to file its PFR, and thus the PFR filed by CDTFA on March 23, 2018, was untimely. Appellant alternatively contends that OTA has no authority to accept the PFR. Appellant further argues that jurisdiction over this appeal ended with the board on November 16, 2017, the date that the board decided this appeal, because under the board's regulations only a taxpayer may file a PFR of a decision of the board.

[5] Chapter four of the board's Rules for Tax Appeals (Regulations 5410 through 5465) is anticipated to be repealed during 2019, and chapter 5 is anticipated to be substantially revised.

Government Code section 15672(a) specifically provides, in pertinent part, that OTA is the successor to, and is vested with all the duties, powers, and responsibilities of the board necessary or appropriate to conduct business, franchise, and income tax appeals. The Government Code further provides that on and after January 1, 2018, the board shall have no legal authority to, and shall not, conduct an appeals hearing, make a determination, issue or publish a decision on an appeal, or take any other action with respect to such an appeal heard by the board before January 1, 2018, for which the board's hearing, determination, decision, or any other action is, for any reason, not final before January 1, 2018. (Gov. Code, § 15600, subd. (d)(2) [emphasis added].) If an appeal over such a matter is not final before January 1, 2018, the board loses its jurisdiction over the appeal. Further, on and after January 1, 2018, OTA gains jurisdiction over such an appeal and is required by law to conduct such an appeal. (Gov. Code, § 15674(a)(1).) Therefore, we find that OTA's regulations applied to this appeal effective January 1, 2018.

Emergency regulations promulgated by OTA, effective prior to January 3, 2019, set forth the timeframe to file a PFR of a decision of the board, and provide that when the board has issued a decision which is not final before January 1, 2018, before that decision becomes final, any party may submit a PFR with OTA pursuant to Regulation 30820. (Reg. 30832(b).) [6] Regulation 30820 sets forth the grounds for a rehearing, and also provides that any party may submit a PFR no more than 30 days after OTA issues a written decision (i.e., before the decision goes final).

The law provides that the decision of the board upon a petition for redetermination becomes final 30 days after service upon the petitioner of written notice thereof. (R&TC, §§ 6486, 6564.) BOE Regulation 5560(b) similarly provides, in pertinent part, that the board's decision on a business tax appeal "shall become final 30 days after the date notice of the Board's decision is mailed to the taxpayer" unless a timely PFR is filed before the decision goes final. Appellant first received written notice of the board's decision in a Billing and Refund Notice (Notice) dated February 23, 2018, which provided:

> Notice of Board Action: The Board concluded that further adjustments are warranted to the amounts of unreported taxable sales, disallowed claimed nontaxable sales for resale,

[6] This regulation was replaced, in substantially the same form, by OTA Regulation 30106, effective January 3, 2019.

> and disallowed claimed exempt sales in interstate commerce. Accordingly, the Board ordered the tax and penalty redetermined to zero.

This document constitutes written notice of the board's decision to grant the late protest and refund claims. Furthermore, this was the first date that written notice of the board's decision was "mailed" to appellant. (Reg. 5560(b).) Therefore, the date the Notice was mailed to appellant, and not the date of the oral hearing, is considered "the date notice of the Board's decision is mailed to the taxpayer." (Reg. 5560(b) [emphasis added].) Under these facts, the 30-day timeframe to file a PFR began on February 23, 2018. This means either party had until March 25, 2018, to timely file a PFR with OTA before the board's decision became final. CDTFA filed its PFR on March 23, 2018, therefore it was timely within the meaning of OTA's emergency regulations.

With respect to the contention that OTA does not have authority to accept the PFR, on and after January 1, 2018, OTA Regulation 30832 allows any party to file a PFR of a business tax appeal before OTA. Regulation 30832 specifically applies to petitions for rehearing of non-final decisions of the board. (Reg. 30832(b).) Therefore, BOE Regulation 5561, which precluded CDTFA from filing a PFR, was superseded by OTA Regulation 30832, as of January 1, 2018.[7]

Appellant alternatively alleges that "the Department has fraudulently withheld issuance of the [N]otice . . . in a dishonest attempt to avoid the finality of the Board's determination." [8] As indicated above, CDTFA timely filed its PFR within the timeframe specified in our own regulation. Therefore, regardless of whether or not some other agency delayed in issuing notice of the board's action, the PFR was timely filed within the meaning of our own regulations. We are bound to follow our own regulations. (See *Newco Leasing, Inc. et al. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124.) Therefore, we find that the PFR was timely.

[7] OTA Regulation 30832 was replaced by Regulation 30106, effective January 3, 2019. The provisions cited herein were carried over to the new regulation.

[8] This argument is premised on the fact that under BOE Regulation 5561, on and after February 6, 2008, only the taxpayer had the right to file a PFR of a business tax appeal before the board. In other words, appellant contends that CDTFA prevented the Notice from being mailed to appellant until after January 1, 2018 (when OTA's emergency regulations became effective), so that CDTFA could file a PFR (which it could not do under BOE Regulation 5561).

II. The Late Protest

The board found in favor of appellant and deleted, in their entirety, all three audit items at issue in CDTFA's determination. CDTFA challenges the board's decision with respect to all three items as either contrary to law or unsupported by any substantial evidence.

Underreported Taxable Sales

The law creates a statutory presumption that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) The retailer has the burden of proving that a sale of tangible personal property is not a retail sale unless the retailer timely and in good faith obtains a resale certificate from the purchaser. (R&TC, § 6091; Reg. 1668(a).) Thus, the California Supreme Court has concluded that under R&TC section 6091, where a taxpayer's bank deposits amount to more than the gross receipts from sales as recorded in the taxpayer's sales journal, the difference, in absence of records showing otherwise, is deemed to represent additional taxable sales. (*People v. Schwartz* (1947) 31 Cal.2d 59.)

In the instant case, the audit liability included $2,788,543 in measure for underreported taxable sales, which was established using the markup method. CDTFA alternatively contends that an underreported liability can be established based on a bank deposit analysis, which shows that bank deposits, after making reductions for loans and other non-sales revenue, exceed reported sales by $2,238,416. At the oral hearing before the board, appellant alleged that the entire $2,238,416 difference found in the bank deposit analysis represents loans or transfers from a related business. However, appellant was unable to provide any documentation to support this contention. On questioning, appellant admitted that it was not able to "isolate the additional" $2,238,416, and countered that CDTFA is unable to show the source for the additional amount or that the source represents taxable sales. Nevertheless, this argument is unpersuasive because CDTFA does not have the burden of showing that appellant's gross receipts resulted from taxable sales; to the contrary, the law imposes on appellant the burden of establishing that any portion of its gross receipts is not subject to tax. (R&TC, § 6091.)

Furthermore, CDTFA provided documentary evidence reflecting that appellant was only able to establish $2,016,449 in loans and transfers from a separate account. In support, CDTFA also provided evidence showing that CDTFA already accounted for all of these $2,016,449 in non-taxable transfers in CDTFA's bank deposit analysis (i.e., the additional $2,238,416 in

underreported taxable sales at issue is the excess amount of deposits for which appellant failed to provide any documentary evidence). Nevertheless, the board concluded that the entire measure of tax for underreported taxable sales should be deleted.

Based on the above, we find the board's conclusion is both contrary to the statutory presumption set forth in R&TC section 6091, and unsupported by any substantial evidence.

Disallowed Claimed Nontaxable Sales for Resale

Regarding the disallowed sales for resale, the law presumes that appellant's sales are taxable retail sales because appellant failed to obtain a resale certificate from its customers to support any of the five disallowed transactions from the test period. (R&TC, § 6091; Reg. 1668(a).) In such cases, the law provides, in pertinent part:

> [I]f the seller does not timely obtain a resale certificate . . . the seller will be relieved of liability for the tax only where the seller shows that the property:
>
> (1) Was in fact resold by the purchaser [prior to use[9]] or
>
> (2) Is being held for resale by the purchaser and has not been used by the purchaser . . .
>
> (3) Was consumed by the purchaser and tax was reported directly to the Board by the purchaser on the purchaser's sales and use tax return, or
>
> (4) Was consumed by the purchaser and tax was paid to the Board pursuant to an assessment against or audit of the purchaser . . . .

(Reg. 1668(e) [Emphasis added].) Here, CDTFA disallowed all five sales at issue because appellant failed to obtain a resale certificate from the customers. Furthermore, according to CDTFA's records, all of the customers held seller's permits at some point in time but closed out their seller's permits between three to four years prior to the date of the sales at issue (meaning the customers could not have purchased the type of property at issue without payment of tax pursuant to a resale certificate). (Reg. 1668(b)(1)(C).) Thus, there was no evidence that the property was in fact resold by the purchaser, was being held for resale by the purchaser, or that tax was paid to the state.

Nevertheless, the board decided to delete this audit liability in its entirety based, in part, on statements from the chair of the board that the chair and her office had conducted their own

[9 For these purposes, "use" and "used" mean a use for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business.]

independent investigation and "researched TEAL[E] ourselves."[10] Based on the investigation, the board's chair determined that a successor to one of the customers at issue held a seller's permit, and the board's chair further alleged (without providing support or an opportunity for CDTFA to address these new allegations) that during an unrelated "investigation audit" of the other customer, the customer reported it last sold products four years prior to the unspecified date on which it was contacted.[11]

The board's rules for tax appeals state that the board's staff "must provide copies of any documentary evidence that has been submitted or officially noticed," and that each party "will be permitted to comment on or respond to [any] evidence." (Cal. Code Regs, tit. 18, § 5523.6(a), (e).) Here, we find that the presentation of new evidence by the trier of fact at the hearing that was not distributed to the parties constitutes an irregularity in the proceeding that materially affected CDTFA's rights on appeal. (See Cal. Code Regs, tit. 18, § 5523.6(e).) This irregularity was particularly material because CDTFA was unaware of, and was not given an opportunity to comment on or respond to, the new evidence, as required by the board's own regulations. (See Cal. Code Regs, tit. 18, § 5523.6(a).) That irregularities such as this prevented a fair consideration of this appeal is further evidenced in the oral hearing transcript, which indicates that the chair of the board stated, in connection with the discussion of whether to grant the underlying refund claim for all payments made on this liability (discussed in more detail below), that she wanted to decide this case on the day of the oral hearing "because I don't want to have to go back and search a record." Immediately following this statement, two other board members expressed agreement with this sentiment, by responding, respectively, "Yeah" and "All right," and the board proceeded with making a motion on the appeal, which passed 4-to-1. Thus, the hearing transcript indicates that, in deciding this appeal, the board members placed a higher priority in resolving the appeal prior to transfer to OTA, over a recognized need for additional evidence or briefing to reach an informed decision. In rushing to judgment, CDTFA was not afforded time or an opportunity to address the new allegations or evidence raised by a board member. Therefore, we find that there was a material irregularity that prevented a fair consideration of the appeal.

[10] TEALE is an electronic database containing confidential taxpayer records for all accounts maintained by CDTFA, including return history, audit history, social security numbers, and registered account information.

[11] The chair's statements and allegations on the matter start on page 33 of the reporter's transcript, and continue uninterrupted until the end of page 37.

Furthermore, even if true, the alleged statement by the customer that it had at some point in time been engaged in selling tangible personal property has no legal relevance with respect to whether the sale at issue was a nontaxable sale for purposes of resale.[12] This statement also fails to satisfy any one of the four elements specified in Regulation 1668(e) as a basis for rebutting the presumption of taxability. The board was required to follow Regulation 1668. (See *Newco Leasing, Inc. et al. v. State Bd. of Equalization, supra*, at p. 124.) Therefore, the board's decision was both contrary to law and unsupported by any substantial evidence.

Disallowed Claimed Exempt Sales in Interstate Commerce

R&TC section 6396 provides, in pertinent part, an exemption from sales tax if the tangible personal property, pursuant to the contract of sale, was required to be shipped, and was in fact shipped, to a point outside this state by means of facilities operated by the retailer, or delivery by the retailer to a common carrier, for shipment to such out-of-state point. (R&TC, § 6396; Reg. 1620, subd. (a)(3)(B).) Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state must be retained by the retailer to support any such claimed deductions from the sales tax. (Reg. 1620, subd. (a)(3)(D).) Here, appellant failed to maintain shipping or delivery documentation as required by Regulation 1620(a)(3)(D), to support any of the four disallowed transactions from the test period. Additionally, appellant's own records reflect that it actually shipped one of the four disallowed transactions to a purchaser in California, which as a matter of law defeats the claimed exemption. Furthermore, CDTFA's records reflect that, prior to the oral hearing before the board, appellant "did not raise a specific contention regarding disallowed sales in interstate commerce." Finally, appellant did not offer any evidence or testimony regarding these transactions at the oral hearing before the board, to rebut the statutory presumption that tax applies. (R&TC, § 6091; Regs. 1667(a), 1668(a).)

Notwithstanding these facts, the statutory presumption that tax applies, and the lack of any evidence, testimony, or even argument to the contrary, the board decided to delete this entire audit item from the liability. According to the reporter's transcript, this decision was based, in part, on the representation by the board's chair that the in-state sale was "a nonrecurring event

[12] The mere fact that this customer had a seller's permit is evidence that it was at some point in time engaged in the sale of tangible personal property. The issue here is that the customer's seller's permit (and authority to purchase jewelry without paying tax for purposes of resale) was terminated three years *prior* to the sale at issue.

since . . . there were no other transactions like it." Immediately following this representation, a second board member expressed that CDTFA did not attempt to understand "the uniqueness" of the taxpayer's business model, and made a motion to grant for the taxpayer, which the chair seconded.[13] Nevertheless, the law provides no exemption from tax for erroneously reporting a taxable sale as nontaxable on a tax return. We find that the board's decision was both contrary to law and unsupported by any substantial evidence.

III. Timeliness of the Refund Claims

The board decided that all of appellant's refund claims were timely and, therefore, to refund all amounts paid by appellant; $390,310.30. CDTFA contends that this decision was unsupported by any substantial evidence or was contrary to law, and that appellant did not even file a refund claim for a number of the payments.

CDTFA concedes that some of appellant's refund claims were timely. The dispute subject to this petition for rehearing concerns 17 payments totaling $164,371.89, made during the period November 6, 2014, though October 27, 2016. During this time period, according to CDTFA's records, appellant only filed one claim for refund on February 1, 2016. Appellant made 7 of the payments at issue, totaling $69,060, between the period November 6, 2014, through July 27, 2015, a date which is more than six months prior to appellant's refund claim. In other words, CDTFA's records reflect that appellant's February 1, 2016 refund claim was untimely as to these 7 payments, because February 1, 2016, is more than six months after all of these payments. CDTFA contends that an eighth payment made on January 27, 2016, was not covered by the February 1, 2016, claim for refund, or any other refund claim.

Appellant made the remaining 9 payments totaling $85,311.89 after February 1, 2016, and CDTFA has no evidence in its records that appellant filed a claim for refund after February 1, 2016. Appellant had been making installment payments on a monthly basis. Of the 17 payments at issue, 14 of those payments were made on a monthly basis in the amount of $10,000. The remaining 3 payments are as follows: (1) the March 2015 payment was for $4,000; (2) the following month's payment, for April 2015, was for $15,060; and (3) the final payment for October 2016, which paid off the liability, was for $5,311.89.

[13] The motion was withdrawn to allow further discussion by the board. The board discussed whether to defer to case for further review, and ultimately granted the appeal in lieu of deferring because of the risk that the case would transfer over to the Office of Tax Appeals if it were deferred.

In order to constitute a valid claim for refund, the claim must be in writing, signed, and state the specific grounds upon which the claim is founded. (R&TC, § 6904.) A claim for refund filed prior to January 1, 2017, cannot be considered valid with respect to any payments that are made after the date of that refund claim. (R&TC, § 6902.6.) The failure to file a timely and valid claim for refund constitutes a waiver of any demand against the state on account of an overpayment. (R&TC, § 6905.) As relevant here, in order to be timely a claim must be filed no later than six months from the date of payment. (R&TC, § 6902.) No refund may be approved after six months from the date of overpayment. (R&TC, § 6902.) As an exception, in the case of an overpayment due to lien of levy, a timely claim for refund may be filed within three years of the date of overpayment. (R&TC, § 6902.3.)

On the date of the hearing, a board member raised a new contention, on behalf of appellant, that the three-year statute of limitations applies because CDTFA collected some of the payments via levy. In support, appellant stated that payments that were not for "a round dollar amount" are levy payments. In response to the board member's new contention, CDTFA stated that three payments were made via levy, and at least two of those payments were already accepted as timely, and that CDTFA could review its records and confirm whether or not one of the 17 disputed payments were made via levy. Of the 17 payments at issue, the only payment that was not for a round dollar amount was the final payment on October 27, 2016, for $5,311.89, and this payment was made on the same day of the month as the preceding 11 payments, and was one month after the preceding payment, which reasonably indicates it was one of the monthly installment payments.

Appellant separately contended that it had filed timely refund claims for all payments, but appellant later conceded on the record that some of the refund claims allegedly filed for the payments at issue were not signed. In support, appellant submitted to the board copies of the unsigned refund claims that were allegedly filed with CDTFA. Nevertheless, the board concluded that "all the refund claims were timely and therefore grant[ed] the refund of all payments in full." As indicated above, in reaching the decision to grant the appeal, the chair of the board stated that she wanted to decide this case on the day of the oral hearing because she did not "want to have to go back and search a record," and this sentiment was supported by other board members.

Here, even if we accept appellant's contention that some of the 17 disputed payments

were made via levy and thus, the three-year statute of limitations applies, 14 of the 17 payments (i.e., $140,000 of the $164,371.89 in disputed payments) were $10,000 monthly payments that appellant made as part of a monthly installment arrangement, which are statutorily excluded from the three-year statute of limitations for payments made via enforcement procedures such as a lien or levy and could not as a matter of law have been timely on this basis. (R&TC, § 6902.3.) Furthermore, appellant admitted on the record that some of the alleged refund claims it filed for disputed payments were "unsigned" which, as a matter of law, independently disqualifies them from qualifying as claims for refund. (R&TC, § 6904.) Finally, according to CDTFA's records, appellant did not file any refund claims after February 1, 2016, and appellant was unable to provide copies of signed refund claims allegedly filed after this date, which additionally means the board had no statutory authority to refund the nine payments made after February 1, 2016, totaling $85,311.89.

Even if we accept appellant's contentions as true, as a matter of law the board would have been statutorily precluded from granting all of the refund claims in their entirety. Therefore, the board's decision to grant all the refund claims was both contrary to law and unsupported by any substantial evidence.

IV. Materiality

We find that the board's erroneous decisions on the late protest and related refund claims were material because both the law and the evidence provided on appeal do not support either: (1) the decision in favor of appellant as to, at a minimum, a substantial portion of the audited liability with respect to all three audit items; or (2) the decision that appellant filed timely refund claims with respect to all amounts paid.

HOLDING

As a result of the board making decisions that were both contrary to law and unsupported by any substantial evidence, appellant's administrative protest and underlying refund claims were granted instead of denied as to all or substantially all of the liability. Additionally, irregularities at the oral hearing prevented a fair consideration of CDTFA's position on appeal. Therefore, the board's errors were material and a rehearing is warranted.

DISPOSITION

A rehearing is granted as to all issues before the board in the consolidated appeal involving the late protest and the underlying claims for refund.

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge