OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011847
	) CDTFA Case ID: 838958
HEMOPET	) CDTFA Account No. 102-136444
dba Pet Life Line	)
	) Date Issued: September 17, 2019
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Charles Berman, General Counsel

For Respondent: Kevin B. Smith, Attorney

A. KWEE, Administrative Law Judge: On May 7, 2019, the Office of Tax Appeals (OTA) issued a written opinion sustaining, in substantial part, a decision issued by the California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by Hemopet dba Pet Life Line (Hemopet). CDTFA's decision denied Hemopet's petition for redetermination of a July 28, 2014, Notice of Determination (NOD), for $81,830.27 in tax, plus accrued interest, for the period January 1, 2008, through June 30, 2011. On appeal, OTA granted partial interest relief, but otherwise sustained CDTFA's decision to deny the petition.

By letter dated June 3, 2019, Hemopet timely petitioned OTA for rehearing of this matter, on the basis that there is insufficient evidence to support OTA's written opinion and the opinion is against the law. Hemopet separately requested that this matter be held in abeyance pending the outcome of recently proposed legislation. We conclude that the grounds set forth therein do not constitute good cause for a new hearing, and we deny Hemopet's request to hold this matter in abeyance because the proposed legislation does not impact the issues on appeal.

DISCUSSION

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 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 issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs, tit. 18, § (Regulation or Reg.) 30604; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.)

As provided in the State Board of Equalization (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 rehearing exist. (See, e.g., Regs. 5461(c)(5), 5561(a).) OTA's precedential opinion 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, for guidance in determining whether to grant a new hearing. (See Reg. 30604.)

With respect to factual disputes concerning the sufficiency of the evidence to support OTA's opinion, the standard of review is 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. (See Code Civ. Proc., § 657.) Resolution of such a dispute in a petition for rehearing does not involve a weighing of the evidence, but instead requires a finding that OTA's opinion is contrary to law because it is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of Am*. (1985) 38 Cal. 3d 892, 906.) The relevant question is not over the quality or nature of the reasoning behind OTA's opinion, but whether, after reviewing the evidence in the record, the opinion can or cannot be valid according to the law because it is not supported by any substantial evidence. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

On the other hand, with respect to purely legal issues, a rehearing may be granted on the basis that the opinion is against the law when there is "doubt that [the Panel] properly decided the legal issue." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188.) A rehearing may also be granted on the basis that it is against the law when, on review, the Panel disagrees with the written opinion. (See *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 923.) In summary, the Panel has discretion in granting a rehearing on the basis that the decision is against the law. (See *In Re Wickersham's Estate* (1902) 138 Cal. 355, 361.)

As indicated above, in addition to establishing that a ground for rehearing exists, the basis for rehearing must materially affect the substantial rights of the party seeking a rehearing. 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.)

In its petition for rehearing, Hemopet first contends that OTA failed to consider the evidence establishing that a licensed veterinarian working for Hemopet supervises the withdrawal of blood from the donor dogs. Hemopet contends that the nontaxable furnishing of blood, within the meaning of the sales and use tax law, includes the withdrawal of blood from donor dogs. On review of the record, we find that there is no factual dispute that a licensed Hemopet veterinarian withdrew the blood at issue. We accept this fact as true. As such, resolution of this rehearing matter involves a purely legal issue. The facts that Hemopet emphasizes in its petition for rehearing have no relevance or bearing on the legal basis for our decision. As relevant, tax applies to the sales of drugs, including blood, to licensed veterinarians. (Reg. 1506, subd. (j)(2)(A).) Those veterinarians are regarded as consumers of drugs and medicines, such as companion animal blood products, that they furnish in the performance of their professional services. (Rev. & Tax. Code, § 6018.1; Reg. 1506, subd. (j)(2)(A).) In summary, sales tax applies at the time animal blood is sold to a veterinarian, instead of at the time that the veterinarian uses the blood in a transfusion. Thus, for sales and use tax purposes, the taxable transaction is the transfer of animal blood by Hemopet to other veterinarians for a consideration. We previously found that blood was transferred for a consideration to other veterinarians who infused the blood into the recipients. Hemopet separately concedes that it did not infuse the blood into the recipient dogs. As such, we find that our decision is consistent with the law, and we decline to grant a rehearing on this basis.

Second, Hempet contends that the board previously decided this same issue in a 1993 oral hearing, and, because the board no longer has a copy of its transcript from that oral hearing, OTA was required to accept as true the statements provided by Hemopet's president concerning the 1993 board hearing. This involves a purely factual dispute regarding the sufficiency of the evidence. On its petition, Hemopet merely restates the evidence raised during the oral hearing. We previously found ample evidence to conclude that the 1993 oral hearing discussed the

application of the welfare exemption (a property tax matter) and, as such, has no bearing on Hemopet's sales and use tax appeal. We are not convinced a different decision should have been reached, and we find sufficient evidence to support our decision. Therefore, we conclude a rehearing is not warranted on this basis.

Finally, Hemopet requests that OTA hold this matter in abeyance pending the outcome of Senate Bill 202 (2019-2020 Regular Session), which, if signed into law, would add section 9213 to the Food and Agriculture Code.[1] The proposed legislation provides, in pertinent part, that for purposes of the Food and Agriculture Code, with respect to the licensing and regulation of animal blood blanks by the California Department of Food and Agriculture, the production and use of animal blood for transfusion purposes is considered a service. Nevertheless, we must be mindful of the issue on appeal. Hemopet's liability is set forth in the Revenue and Taxation Code, which is administered by CDTFA. Even if Senate Bill 202 is signed into law, the changes to the Food and Agriculture Code would have no bearing or relevance to Hemopet's sales and use tax liability. As such, we deny Hemopet's request to hold this matter in abeyance pending the outcome of recently proposed legislation.

For the foregoing reasons, Hemopet's petition for a rehearing and related request to hold this matter in abeyance are denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge

[1] The draft version of the proposed legislation submitted by Hemopet would have amended Food and Agriculture Code section 9206; however, that version was superseded by subsequent changes. The bill was thereafter passed by the state legislature on September 11, 2019. It has not yet been approved by the Governor.