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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18073396) CDTFA Case ID: 957172
ISIF MADFISH, INC.	) CDTFA Account No. 101-144788)
	) Date Issued: September 13, 2019)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Adam Brewer, Attorney

For Respondent: Kevin C. Hanks, Representative

A. KWEE, Administrative Law Judge: On April 2, 2019, the Office of Tax Appeals (OTA) issued a written opinion sustaining, in part, a decision issued by the California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by ISIF Madfish, Inc., dba Little Madfish (appellant). CDTFA's decision denied appellant's petition for redetermination of a May 27, 2016, Notice of Determination (NOD), for $411,419.96 in tax, plus accrued interest, a negligence penalty of $36.71, a 25 percent fraud penalty of $56,076.14, and a 40 percent penalty of $57,366.14 for failing to remit sales tax reimbursement collected from customers, covering the period October 1, 2008, through October 3, 2013. On appeal, OTA deleted taxes, interest and penalties for all periods prior to October 1, 2010, as conceded by CDTFA at the oral hearing, but otherwise sustained CDTFA's decision to deny the petition.

By letter dated June 3, 2019, appellant timely petitioned OTA for a rehearing, on the basis that there is insufficient evidence to justify OTA's opinion or the opinion is contrary to law. We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

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

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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, § (Reg.) 30604; *Appeal of Do*, 2018-OTA-002P.)

As provided in the State Board of Equalization (board)'s precedential decision in *Appeal of Wilson Development, Inc.*, (94-SBE-007) 1994 WL 580654, 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 original opinion. (See *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 923.) In summary, the Panel has discretion in granting a rehearing on the

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basis that the opinion is against the law. (See *In Re Wickersham's Estate* (1902) 138 Cal. 355, 361.)

The basis for appellant's petition for rehearing is that appellant contends there are non-fraudulent explanations for some of the facts and circumstances identified in our opinion as a basis for finding fraud. First, appellant restates its contention that the underreporting was due to erroneously reporting monthly sales totals rather than quarterly sales totals, and in support cites a declaration by the employee responsible for filing the returns, stating that she was never instructed to fraudulently mispresent sales figures. Next, appellant contends that the inadvertent reporting of monthly totals would also explain the consistent and significant nature of the underreporting. Appellant contends that its deleted or missing sales data may reasonably be explained by the distressed financial condition of the business, and, considering that it filed for bankruptcy and ultimately terminated operations, it is unsurprising that complete records are not available. In summary, appellant believes that OTA failed to consider evidence of alternative, non-fraudulent, explanations for the underreporting. Appellant separately cites section 0501.05 of CDTFA's Audit Manual, which explains CDTFA's policy that CDTFA generally will not impose a fraud penalty when there is doubt as to whether the underreporting was due to fraud. Here, appellant contends that, because OTA's April 2, 2019, written opinion stated that there is no direct evidence of fraud, there must be doubt as to our fraud finding, and this doubt must be interpreted in favor of appellant as provided in CDTFA's audit manual.

It is important to emphasize here that rarely will there be direct evidence of fraud such as, for example, different sets of books and records, or an email specifically directing the return preparer to underreport the liability. Concluding that a taxpayer intended to evade the payment of tax is a factual determination that we do not take lightly, and is made only after consideration of all the evidence. After considering the evidence, including appellant's missing or deleted transactions, significant underreporting percentage, missing sales data for later periods, statements from the on-site sales manager, and/or failure to review its own recorded sales data prior to filing the returns, we previously concluded that CDTFA established fraud based on clear and convincing evidence. Our April 2, 2019, written opinion in no way stated or implied that there was doubt as to our finding of fraud. To the contrary, we concluded that CDTFA established fraud based on *clear and convincing evidence*. Therefore, we are not convinced that a different result should have been reached, or that our opinion cannot be valid under the law due

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to a lack of supporting evidence.[1] Aside from this contention, appellant provided no new arguments or evidence, and has not alleged or established any other basis for granting a rehearing. Appellant's petition for a rehearing is therefore denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

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Neil Robinson
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Neil Robinson
Administrative Law Judge

[1] We do not address appellant's contention that we must consider CDTFA's Audit Manual because OTA is bound to correctly apply the law irrespective of any CDTFA policy or procedure.