

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No.18032496
TOBACCO REPUBLIC, INC.) CDTFA Case ID 727806
) CDTFA Acct No. CP STF 50-002743
)
) Date Issued: October 22, 2019
)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Oneida Morgan-Hawley, Chief Executive Officer

For Respondent: Joshua W. Aldrich, Tax Counsel

Office of Tax Appeals: Natasha Ralston, Tax Counsel IV

M. GEARY, Administrative Law Judge: On December 13, 2017, this appeal of an administrative protest¹ came on for hearing before the Board of Equalization (BOE). The following items from a determination issued by the California Department of Tax and Fee Administration (CDTFA) for the period January 1, 2009, through June 30, 2011, remained at issue: tax of \$13,406.19² (after a reduction recommended by CDTFA staff but not yet acted on by BOE); a finality penalty of \$1,340.62;³ and interest (through December 25, 2017) of \$7,565.64. BOE partially granted appellant’s administrative protest, directing CDTFA to take the following actions: abate the finality penalty, with the condition that the tax due must be paid in full within 30 days of the notice of the BOE’s decision; relieve interest for the period of July 1, 2012, through January 31, 2013, and the period of September 1, 2013, through July 31, 2015; and redetermine tax to \$13,406.19. By letter dated February 28, 2018, appellant

¹ A late appeal may be accepted as an administrative protest. (Cal. Code Regs., tit. 18, § 5220.)

² The tax amount of \$13,406.19 has a corresponding measure of unreported distributions of tobacco products of \$30,522.

³ If a taxpayer does not timely pay a determination when it becomes due and payable, CDTFA adds a 10-percent penalty of the amount of the determination, which we refer to as a “finality penalty.” (See R&TC, § 30264.)

petitioned for rehearing of this matter.⁴ Upon consideration of appellant's petition for rehearing, we conclude that the grounds set forth therein do not constitute good cause for a new hearing, as required by California Code of Regulations, title 18, section (Regulation) 30604.

Pursuant to Regulation 30604, the Office of Tax Appeals is authorized to grant a rehearing on the following grounds when a substantial right of the party seeking a rehearing has been materially affected:

- an irregularity in the appeal proceedings which occurred prior to issuance of the written opinion and prevented fair consideration of the appeal;
- an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented;
- newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to issuance of the written opinion;
- insufficient evidence to justify the written opinion or the opinion is contrary to law; or
- an error in law.

(See also *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 and *Appeal of Do*, 2018-OTA-002P.)

Appellant contends that it is entitled to a rehearing on the grounds that the BOE's opinion is contrary to the law that was in effect during the audit period (January 1, 2009, through June 30, 2011).⁵ It argues that there is a "well documented ambiguity" in Revenue and Taxation Code (R&TC) section 30017,⁶ which prevented appellant from knowing how to calculate the "wholesale cost" of the tobacco products. Appellant also contends the CDTFA and BOE erroneously relied on and applied Regulation 4076(b)(1),⁷ to determine wholesale cost, when that

⁴ Pursuant to Assembly Bill 102, The Taxpayer Transparency and Fairness Act of 2017, as amended by Assembly Bill 131 (2017-18 Reg. Sess.), the duty of processing administrative appeals for cigarette and tobacco products tax matters was transferred from the BOE to the newly created Office of Tax Appeals.

⁵ Appellant does not cite to a specific ground but it argues that the BOE erroneously applied a regulation retroactively. Our analysis and conclusions would be the same if it had argued that the BOE's application of the regulation to its decision was an error in law.

⁶ R&TC section 30017 states, "'Wholesale cost'" means the cost of tobacco products to the distributor prior to any discounts or trade allowances."

⁷ Regulation 4076(b)(1) states, "If finished tobacco products are purchased by a distributor from a supplier in an arm's-length transaction, the 'wholesale cost' of the tobacco product is the amount paid for the tobacco product, including any federal excise tax, but excluding any transportation charges for shipment originating within the United States. Discounts and trade allowances must be added back when determining 'wholesale cost.'"

regulation was not adopted until long after the audit period on May 24, 2016.⁸ In effect, appellant argues that BOE should not have applied Regulation 4076 retroactively, that BOE should have judged its actions by the rules that were in effect at the time appellant calculated and reported the wholesale cost of tobacco products distributed, and that appellant did the best it could, given the ambiguity in the law at the time.⁹

CDTFA argues that appellant was a licensed distributor of tobacco products, who distributed tobacco products in this state. It contends that during the audit period, the Cigarette and Tobacco Products Tax Law imposed a tax upon every distribution of tobacco products by a distributor based on the wholesale cost of the tobacco products. CDTFA asserts that, at all relevant times, “wholesale cost” was statutorily defined in R&TC section 30017 as the cost of tobacco products to the distributor prior to any discounts or trade allowances and that appellant was aware the wholesale cost also included federal excise tax, at least in part because the form appellant used to report tobacco distributions specifically stated that “wholesale cost” included the dollar value of samples, discounts and trade allowances, as well as any federal excise or U.S. Customs’ taxes paid. According to CDTFA, taxpayer did not include discounts or federal excise tax in determining the wholesale cost of tobacco products as required by R&TC section 30017, which resulted in the underreporting that is a subject of this appeal.¹⁰

Regarding appellant’s argument that the BOE erroneously applied Regulation 4076 retroactively, CDTFA cites R&TC section 30451, which states, “The [BOE] shall enforce the provisions of this part and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part. The [BOE] may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.”¹¹ It argues that, because there is no limiting language in Regulation 4076, the BOE correctly applied it in this appeal. CDTFA

⁸Appellant contends that the auditor relied on Regulation 4076 and that during the hearing, CDTFA attorneys and a BOE member referred to Regulation 4076 as if it was controlling.

⁹ Appellant made the same arguments to the BOE conference holder that it did when it appeared before the BOE and that it does now.

¹⁰ It is not the only subject of this appeal. According to the October 27, 2015 Decision and Recommendation (D&R) issued by the Appeals Division of the BOE and a subsequent reduction by the CDTFA, the disputed measure of unreported distributions of tobacco products was \$30,522. The measure of the discounts and federal excise taxes is \$16,771.51, which leaves a difference of \$13,750.49 (\$30,522 - \$16,771.51) that appears to be undisputed in the petition for rehearing.

¹¹ The reference to the BOE is also a reference to CDTFA. (R&TC, § 20.)

also asserts that Regulation 4076 merely clarified information already contained in R&TC section 30017 and in the tax return form that appellant completed for each of the reporting periods within the audit.¹²

R&TC section 30451 states that CDTFA (and the BOE before it) are authorized to promulgate regulations and “prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.” This language indicates that a regulation so promulgated is to be applied retroactively unless the language of the regulation prescribes only prospective application. (See *Aerospace Corp. v. State Bd. Of Equalization* (1990) 218 Cal.App.3d 1300, 1308; *La Société Francaise De Bienfaisance Mutuelle v. Cal. Employment Com.* (1943) 56 Cal.App.2d 534, 550.)¹³ Regulation 4076, which was operative on October 1, 2016, does not contain language that would limit its retroactivity. Therefore, we find that to the extent the BOE applied Regulation 4076 to this appeal on December 13, 2017, such application was entirely proper.¹⁴

¹² The form, then known as BOE-501-CT, contained the following language, “Wholesale Cost means the cost of tobacco products and samples to the distributor, including the dollar value of samples, and the dollar value of any manufacturer’s discounts or trade allowances (Revenue and Taxation Code section 30017, 30123, and 30131.2). For example, the wholesale cost of any manufactured tobacco product that is distributed in a taxable manner shall include all manufacturing costs, the cost of raw material (including waste materials not incorporated into the final product), the cost of labor, any direct and indirect overhead costs, and any federal excise and/or U.S. Customs’ taxes paid. In addition to the price paid for the tobacco product, the wholesale cost of any tobacco product that is imported into this state directly from outside the country shall include any Federal excise or U.S. Customs taxes paid.”

¹³ Although the rules or regulations discussed in these cases were not promulgated pursuant to R&TC section 30451, they were promulgated pursuant to authority that was defined by language identical to that used in section 30451.

¹⁴ Because this finding is dispositive, we need not address appellant’s argument that R&TC section 30017 is ambiguous. Nevertheless, we note that the BOE provided ample information to tobacco product distributors regarding their reporting obligation long before Regulation 4076 was effective. As a distributor, appellant was required to report its distributions monthly on a Form BOE-501-CT. At all times relevant, and consistent with the clear language of section 30017, this form defined “wholesale cost” to include the dollar value of samples, discounts and trade allowances, as well as any federal excise or U.S. Customs’ taxes paid.

We conclude that the petition for rehearing does not present any grounds establishing good cause for a rehearing. Consequently, appellant's petition for rehearing is hereby denied.

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Michael Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

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Alberto Rosas
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Alberto T. Rosas
Administrative Law Judge