**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 18011077 |
| **GEF OPERATING, INC.** | ) |
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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: Leslie A. Powers

For Respondent: Erin M. Dendorfer, Tax Counsel III

For the Office of Tax Appeals: Neha Garner, Tax Counsel III

K. GAST, Administrative Law Judge: On May 9, 2019, the Office of Tax Appeals (OTA) issued an opinion[1] in which we sustained respondent Franchise Tax Board's proposed assessment. We held that, for the 2011 tax year, appellant was liable for (1) the $800 minimum franchise tax because it was doing business in California under California Revenue and Taxation (R&TC) section 23101, (2) the late-filing penalty, (3) the demand penalty, (4) the filing enforcement fee, and (5) interest. Appellant timely filed a petition for rehearing (petition). Upon consideration of appellant's petition, we conclude the grounds set forth therein do not meet the requirements for a rehearing under California Code of Regulations, title 18, section (Regulation) 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the filing party (here, appellant) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not

[1] Note that two of the three administrative law judges (ALJs) deciding the instant petition for rehearing are not the same ALJs who decided the original opinion in this matter issued on May 9, 2019. Therefore, references herein to "we" or "our" refer to the three-ALJ panel that decided the original opinion.

have prevented; (c) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to the issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code Regs., tit. 18, § 30604(a)-(e).)

In its petition, appellant appears to argue there is insufficient evidence to justify our opinion. On this ground, a rehearing cannot be granted unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that we clearly should have reached a different opinion. (Code Civ. Proc., § 657.)[2] On this basis, appellant contends that our original opinion contains both factual errors and improperly relies on, or misconstrues the relevance of, certain facts that do not support a finding of nexus. For example, it asserts we incorrectly found Hiatt Honey CA LP and its general partner, appellant, shared the same Federal Employer Identification Number (FEIN) and reported 12 employees in California during the 2011 tax year. Rather, appellant alleges, they were employees of Hiatt Honey CA LP, not appellant. Appellant also asserts that, contrary to our finding, having one or more California resident directors, without more, does not establish it was doing business in California when the director meetings only occurred in Washington. We disagree.

The evidentiary record revealed appellant did in fact have employees in California during the disputed tax year,[3] and that the activities of its California resident directors in the state did create nexus. These facts, in addition to others noted in the opinion, sufficiently establish that appellant was doing business in California. But more fundamentally, even if appellant's contentions are correct, our conclusion that it was doing business in California under R&TC section 23101(a) is independently supported by the undisputed fact that it was a general partner

[2] Our predecessor, the State Board of Equalization (SBE), specified the grounds constituting good cause for a rehearing in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654. Reasoning that its adjudicatory responsibilities were similar to those of a trial court, the SBE chose to utilize the applicable provisions of California Code of Civil Procedure (CCP) section 657, which pertain to grounds for a new trial, in determining whether a rehearing was warranted. (*Ibid.*) These grounds have since been adopted as part of OTA's Rules for Tax Appeals (Cal. Code Regs., tit. 18, section 3000 et seq.) under Regulation 30604, discussed above. (See also *Appeal of Do*, 2018-OTA-002P [wherein OTA adopted these grounds in a precedential opinion].) Accordingly, since Regulation 30604 is essentially based upon the provisions of CCP section 657, the language of the statute itself, as well as case law pertaining to the operation of CCP section 657, are persuasive authority in interpreting the provisions contained in Regulation 30604.

[3] Although our opinion incorrectly found that appellant and Hiatt Honey CA LP shared the same FEIN, further review of the record reveals that Hiatt Honey CA LP and appellant did share the same State Employer Identification Number, according to records from the California Employment Development Department. But our incorrect factual finding has no impact on our conclusion.

in at least two limited partnerships (i.e., Hiatt Honey CA LP and Jacob LP) that were themselves doing business in California. As support, we cited to *Appeal of H.F. Ahmanson* (65-SBE-013) 1965 WL 1350 and *Appeals of Amman & Schmidt Finanz AG, et al.* (96-SBE-008) 1996 WL 281551, for the well-established principle that a general partner of a limited partnership is doing business wherever the limited partnership is conducting its business. Appellant failed to provide evidence that, as a general partner, it did not operate or manage its limited partnerships, and even concedes in its petition that it executed management decisions for those limited partnerships from Washington. Therefore, there is sufficient evidence to justify our opinion.

Appellant also appears to contend that our opinion is contrary to law because we applied an incorrect legal standard. On this basis, appellant renews its contention in its initial appeal that for taxable years beginning on or after January 1, 2011, if none of the bright-line nexus thresholds under R&TC section 23101(b)(1) through (4) are satisfied, then a taxpayer is not doing business in California and R&TC section 23101(a) no longer applies. Because, as appellant alleges, its California sales, property, and payroll were less than the applicable thresholds in R&TC section 23101(b)(2) through (4), it was not doing business in California during 2011.

However, as discussed in our opinion, we disagree that appellant made a sufficient factual showing that it has not met these thresholds. This alone was dispositive to our conclusion that appellant did not meet its burden of proving it did not have nexus in California under R&TC section 23101(b). In addition, we considered and rejected appellant's legal argument that R&TC section 23101(a) no longer applies to taxable years beginning on or after January 1, 2011. Simply stated, under certain factual circumstances such as here, a taxpayer can be considered doing business in California and subject to a filing obligation and the $800 minimum franchise tax, even if it does not have a physical presence or derive income from sources within this state. Therefore, our opinion is not contrary to law.

In short, as set forth in our detailed opinion, we have considered and rejected the merits of these and other similar factual and legal contentions made in appellant's petition. For the foregoing reasons, appellant's petition is denied.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

DocuSigned by:
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Richard Tay
Administrative Law Judge

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge

Date Issued: 3/30/2020