OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of: **R. CARMONA dba CARMONA'S COLLISION REPAIR AND CARMONA'S COLLISION REPAIR, INC.**	OTA Case Nos. 18063322, 18063323 CDTFA Case IDs: 848833, 848835 CDTFA Account Nos. 99-734917, 102-357020

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: R. Carmona, Taxpayer

For Respondent: Jason Parker, Chief
Headquarters Operations Bureau

A. KWEE, Administrative Law Judge: On February 24, 2020, the Office of Tax Appeals (OTA) issued a written opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by R. Carmona dba Carmona's Collision Repair (appellant).[1] CDTFA's decision denied appellant's petition of a Notice of Determination (NOD) dated September 16, 2014, for $21,623.23 in tax, plus applicable interest, for the period October 1, 2008, through December 31, 2011. On appeal, OTA sustained CDTFA's decision to deny the petition.

By email sent March 25, 2020, appellant timely petitioned OTA for a rehearing of this matter, based on the following alleged grounds: (1) newly discovered evidence; (2) insufficient evidence to support OTA's written opinion or the opinion is contrary to law; and (3) error in law.

[1] OTA issued a consolidated opinion which concurrently denied an appeal filed by Carmona's Collision Repair, Inc. (OTA Case No. 18063323, CDTFA Case ID 848835, CDTFA Account No. 102-375020). Appellant R. Carmona's personal liability (if any) for the unpaid sales tax liabilities of Carmona's Collision Repair, Inc. was not asserted by CDTFA or otherwise at issue in the appeals decided by OTA in its February 24, 2020 written opinion. Appellant's petition for rehearing specifically limited the dispute to the appeal covering his personal liability for R. Carmona dba Carmona's Collision Repair (OTA Case No. 18063322, CDTFA Case ID 848833, CDTFA Account No. 99-734917). Appellant did, however, question whether CTDFA may hold him personally liable for the corporation's unpaid taxes. Nevertheless, CDTFA did not assert any responsible person liability against appellant, holding him liable for the debts of the corporation, in the matter before OTA. OTA lacks jurisdiction to rule on a matter that is not before OTA. (Cal. Code Regs., tit. 18, § 30103(b).) As such, the corporation's appeal (which did not assert any personal liability against appellant) was deconsolidated for purposes of this petition for rehearing.

We conclude that the grounds set forth in the petition do not constitute good cause for a new hearing.

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, § 30604; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.)

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.)

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., Cal. Code Regs., tit. 18, §§ 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. (Cal. Code Regs., tit. 18, § 30604.)

Newly Discovered Evidence

First, appellant is petitioning for a rehearing on the grounds of newly discovered evidence which could not have been discovered and produced prior to the issuance of the written opinion. (Cal. Code Regs., tit. 18, § 30604(c); see *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 731.) Newly discovered evidence is "material" if it is

likely to produce a different result. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) In support, appellant submitted a link to a document titled "Write it Right A Guide for Automotive Repair Dealers," (Write it Right) written by the Bureau of Automotive Repair (BAR). This document was previously considered by OTA and rejected as evidence on the day of the oral hearing. As such, it is not "newly discovered" evidence for purposes of granting a rehearing. Therefore, we conclude that appellant failed to establish a rehearing is warranted based on newly discovered evidence.

Sufficiency of the Evidence

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; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.)

Here, appellant contends that CDTFA incorrectly noted in its audit working papers that his gross receipts for income tax purposes were $454,649 for 2008, when in fact his gross receipts were higher: $469,603. Appellant also contends that CDTFA incorrectly noted his cost of goods sold for 2008 of $161,722, when his cost of goods sold was also higher: $173,355. Appellant contends that due to this inconsistency, the audit is erroneous and CDTFA's determination is not supported by his income tax returns.

At the start of the audit, CDTFA initially met with appellant and indicated there was a potential underreporting because he reported to the Internal Revenue Service (IRS) a cost of goods sold of $161,722, and gross receipts of $454,649, for 2008. Both IRS amounts substantially exceeded the taxable sales of $53,000 that appellant reported to CDTFA. According to the audit file, this indicated to CDTFA a potential underreporting because $53,000 was so much lower than the number appellant reported to the IRS. In this petition, it appears appellant is alleging error because the potential underreporting was in fact greater than CDTFA initially suspected (since appellant contends now his cost of goods sold and gross receipts were even higher than recorded by CDTFA). Even if true, this would not change the outcome of this appeal in appellant's favor. Moreover, CDTFA did not use the federal income tax returns when determining appellant's underreporting. Instead, the liability was calculated based on an examination of appellant's available source documents (i.e., job folders) for the transactions

which occurred during the period tested.[2] Thus, these federal amounts, even if understated in CDTFA's records, are simply not relevant because they were not a factor that CDTFA used in calculating the liability at issue in this appeal.

In summary, for the reasons explained in our written opinion, CDTFA met its initial burden because there is substantial evidence that appellant underreported his liability. On appeal, appellant had the burden of showing error, which we previously concluded he failed to do. In his petition for a rehearing, aside from his argument regarding incorrect numbers, appellant otherwise restates his arguments from the appeal. Appellant has not convinced us that a different decision should have been reached.

Against Law

In order to find that the opinion is against (or contrary to) law, OTA must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*); *Appeal of Swat-Fame, Inc., et al*., 2020-OTA-045P.) This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The question before us on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA's opinion, but whether that opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) To the extent that the evidence is undisputed (or has been accepted in the light most favorable to the prevailing party), the appeal might turn on a purely legal question. In such circumstances, there may be "doubt that [the Panel] had properly decided the legal issue." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party, with all legitimate inferences to uphold the opinion, the Panel finds that the written opinion incorrectly stated or applied the law and, as such, it is contrary to law. (*Ibid*.; see also *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 923.)

[2] Our decision finds that: "CDTFA calculated the audit liabilities as follows. CDTFA determined audited total sales by accepting the amounts that appellants' records reflected the customers paid during the test periods. CDTFA determined a taxable ratio, based on accepting the ratio of taxable charges that appellants reported on the repair estimates. CDTFA applied the taxable ratio (46.27 percent for [R. Carmona], and 45.61 percent for [the corporation]) to audited total sales to establish audited taxable sales."

In summary, deference must be given to determine whether, assuming all facts in the light most favorable to the prevailing party, the decision can or cannot be valid under the law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.) To the extent only an application of law thereafter remains at issue, the panel has discretion to conclude that the opinion incorrectly applied the law, on the basis that it cannot be valid under the correct legal interpretation (i.e., it is unsupported by any substantial evidence, assuming all facts in the light most favorable to the prevailing party). (See *In Re Wickersham's Estate* (1902) 138 Cal. 355, 361.)

Appellant contends that OTA's opinion is against law because the law precludes auto-dealers from including sales tax on repair estimates. In support, appellant cites the "Write it Right" document from the BAR, which states that sales tax is only included on the invoice, and not the estimate.[3] As such, appellant contends that it was against law for CDTFA to calculate a taxable ratio based on accepting as taxable all estimated charges for which appellant charged sales tax in the estimate. Here, the pertinent facts are indisputable: appellant included repair estimates in its job folders, appellant's repair estimates included a separately stated charge for "sales tax" on some items, CDTFA's taxable ratio was based on appellant's allocation of taxable to nontaxable charges in the estimates. Thus, this is a purely legal dispute: whether, under these facts, the law prevents CDTFA from estimating the deficiency based on appellant's repair estimates. Just as appellant must follow the Business and Professions Code in conducting his automotive repair business, so must CDTFA follow the Revenue and Taxation Code (R&TC) in administering the Sales and Use Tax Law. The R&TC authorizes CDTFA to "compute and determine the amount required to be paid upon . . . the basis of any information within its possession or that may come into its possession." (R&TC, § 6481.) CDTFA accepted appellant's own estimates, based on the repair estimates, for the ratios of taxable to nontaxable charges due to lack of complete invoices. This was consistent with R&TC section 6481. There is nothing in Business and Professions Code section 9884.9 which precludes CDTFA from using repair estimates when estimating a taxpayer's underreporting to the state. As such, we find that appellant failed to establish that OTA's written opinion, sustaining CDTFA, was against the law.

[3] As relevant, the document cites to Business and Professions Code section 9884.9, which does not specifically preclude an estimated charge for sales tax. (See also Cal. Code Regs., tit. 16, § 3353.)

Error in Law

A rehearing may also be granted where there is a procedural error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(e); see Code Civ. Proc., § 657(7).) The panel must conclude that the Panel committed an error as a matter of law. (See *Bruck v. Adams* (1968) 259 Cal.App.2d 585, 587.) Whether such an error has caused sufficient prejudice to justify the granting of a new trial is a matter left to the discretion of the panel. (*Id.* at 588.) A procedural error in law does not include an incorrect application of the law (legal error) in the written opinion. (*Appeal of Swat-Fame, Inc., et al., supra*; Code Civ. Proc., § 657(7).) As discussed above, such a basis for rehearing may only be remedied by a finding that the decision is against law.

Appellant contends that it was error not to accept and consider his "Write it Right" exhibit as evidence on the day of the hearing and in addition, for the reasons discussed above, there was an error in law. As a preliminary matter, the basis for granting a rehearing for an error in law specifically refers to an error in the proceeding, and as such would not apply to an alleged incorrect application of the law in the written opinion. (See *Appeal of Swat-Fame, Inc., et al., supra*; Code Civ. Proc., § 657(7).) We discussed above that appellant failed to establish the written opinion was against law. Therefore, we cannot accept appellant's repeated identical arguments that the written opinion was against law, as a basis to grant a rehearing due to an "error in law." (Cal. Code Regs, tit. 18, § 30604(d), (e).)

With respect to the exclusion of appellant's "Write it Right" document, this document merely summarizes licensing laws and regulations governing automotive dealers and advises dealers to include sales tax on the invoice, and not the estimate. The Lead Administrative Law Judge (ALJ) has the authority to rule on objections to evidence and to take any action deemed necessary for the orderly and fair adjudication of disputes within OTA's jurisdiction. (Cal. Code Regs., tit. 18, § 30213(a), (j).) The Lead ALJ has discretion to exclude evidence with little probative value. (Cal. Code Regs., tit. 18, § 30214(e)(3).) On the day of the oral hearing, the Lead ALJ sustained CDTFA's objection to admitting appellant's "Write it Right" document as evidence on the basis that it was not evidence, it was untimely,[4] and it was not relevant. A law

[4] During a pre-hearing conference held January 9, 2020, and in an order dated January 10, 2020, we informed the parties that the deadline to submit exhibits was 15 days before the hearing. (Cal. Code Regs., tit. 18, § 30420(a).) Appellant did not submit this exhibit until the day of the oral hearing.

summary is not evidence and OTA may research the applicable law. Furthermore, a law summary does not establish what appellant wrote on its invoices or estimates. To the contrary, appellant's own repair estimates prove that appellant did in fact include an estimated charge for "sales tax" on his repair estimates, and appellant does not dispute that these are his own repair estimates. As such, this document is also not relevant. Therefore, we find that OTA's decision to exclude the "Write it Right" document from the evidentiary record was not a legal error, and the Lead ALJ did not abuse his discretion in excluding it.

For the foregoing reasons, appellant's petition for a rehearing is denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Suzanne B. Brown
Administrative Law Judge

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

Date Issued: 6/3/2020