OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18114022
	) CDTFA Case ID: 872315
EMA DESIGN AUTOMATION, INC.	) CDTFA Account No. 100-155781
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Paul W. Raymond, Attorney

For Respondent: Kevin Smith, Tax Counsel III

J. ANGEJA, Administrative Law Judge: On March 4, 2020, the Office of Tax Appeals (OTA) issued a written opinion in which it held that appellant EMA Design Automation, Inc. (appellant) failed to establish a valid basis for relief of tax and interest under Revenue and Taxation Code (R&TC) section 6596, and California Code of Regulations, title 18, section (Regulation) 1705. Appellant filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing. (Cal. Code Regs., tit. 18, § 30604; see also *Appeal of Do*, 2018-OTA-002P.)

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party are materially affected: (a) an irregularity in the appeal proceedings that occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the 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); *Appeal of Do, supra*.) 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.)

Appellant asserts in its PFR that we lacked sufficient evidence to justify our opinion or that it was contrary to law, and that there was an "error in the law applied."[1] Specifically, appellant asserts that we erred in our assertion that oral communications do not constitute a basis for relief under R&TC section 6596, because appellant asserts that the oral advice on which appellant relies is based on the written declaration of appellant's witness. Appellant also asserts that we erred in our statement that appellant should have sought additional written advice from California Department of Tax and Fee Administration (CDTFA).

Regulation 30604(d) provides that a rehearing may be granted on two distinct grounds of insufficiency of the evidence to justify the opinion, or the opinion is contrary to law. (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.) To find that there is an insufficiency of evidence to justify the opinion, we must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the panel clearly should have reached a different opinion. (Code Civ. Proc. § 657; *Bray v. Rosen*, *supra*, 167 Cal.App.2d at p. 684.) To find that the opinion is against (or contrary to) law, we must determine whether 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*).) 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 PFR 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.)

Here, R&TC section 6596(a) provides in relevant part that if a person's failure to make a timely return or payment was due to that person's reasonable reliance on *written advice* from CDTFA (or, prior to July 1, 2017, State Board of Equalization), the person may be relieved of any sales or use taxes imposed. Both the statute and the corresponding regulation are clear that the advice must be written advice. (R&TC, § 6596(a), (b); Cal. Code Regs., tit. 18, § 1705(a),

[1] We interpret appellant's assertion of an "error in the law applied" to mean "contrary to law" (see Cal. Code Regs., tit. 18, § 30604(d)) and not "error in law" (see Cal. Code Regs., tit. 18, § 30604(e)) which refers to an event that occurred during the proceedings of this appeal. Appellant identifies no procedural error that occurred during the hearing, but instead challenges our application of the law. Therefore, we understand appellant to be arguing the fourth ground for a rehearing (i.e., that our opinion is contrary to law), pursuant to Regulation 30604(d).

(b).) Moreover, any reliance on such advice must be objectively reasonable. (R&TC, § 6596(b)(3); Cal. Code Regs., tit. 18, § 1705(a).) There is no provision in the law for relief from a tax liability based on oral advice. Accordingly, we conclude that we correctly applied the foregoing authorities when we concluded that reliance on oral advice does not warrant relief, and that any reliance on written advice must be objectively reasonable. Therefore, we applied the correct law in this appeal.

Furthermore, our conclusion is supported by substantial evidence. CDTFA's auditor allegedly provided *oral* advice to appellant, not *written* advice; and appellant's declaration regarding the alleged oral advice does not transmute it into written advice. As we correctly held in our opinion, oral advice is simply an ineligible basis for relief.

Next, we correctly stated that any reliance on written advice must be reasonable, based on substantial evidence, and we correctly concluded that appellant had not reasonably relied on written advice. Specifically, the written evidence established that 14 of appellant's transactions involving a dongle were properly taxed in the prior audit, and that the Verification Comments in that prior audit indicated the proper application of tax. Despite this evidence, appellant changed its reporting practices and ceased charging or remitting tax on transactions involving the transfer of a dongle based on the comparatively small number of errors (3) in the prior audit. In that factual context, where 14 transactions were properly taxed, and 3 were not properly taxed, we found that appellant's reliance on that conflicting written advice was not objectively reasonable. Our admonition that appellant should have sought *written* clarification from CDTFA may be dicta, but it does not negate our correct conclusion that appellant did not objectively reasonably rely on the available written evidence. Thus, our finding is not contrary to law and is supported by substantial evidence.

Based on the foregoing, we find that appellant has not shown good cause for a new hearing as required by the authorities referenced above, and appellant's petition is hereby denied.

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
3CADA62FB4864CB...
Andrew J. Kwee
Administrative Law Judge

Date Issued: 6/3/2020