OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18053161
SNOWFLAKE FACTORY LLC	CDTFA Case ID: 949158
	CDTFA Account No. 84-227155

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Wm. Gregory Turner, Attorney

For Respondent: Mengjun He, Tax Counsel III

A. KWEE, Administrative Law Judge: On March 23, 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 Snowflake Factory LLC (appellant). CDTFA's decision denied appellant's petition of a Notice of Determination (NOD) dated April 5, 2016, for $95,000 in tax, plus accrued interest. CDTFA's decision concluded that appellant purchased an aircraft in this state on January 27, 2015, for $1,000,000. On appeal, OTA sustained CDTFA's decision.

On April 23, 2020, appellant timely petitioned for a rehearing on the basis there is insufficient evidence to support OTA's written opinion or it is contrary to law. With respect to this ground for a rehearing, appellant contends there are two errors with OTA's written opinion. Appellant contends OTA erred in concluding: (1) that title passage occurred in California; and (2) that the seller was not required to collect sales tax. We conclude that the grounds set forth in the petition do not constitute a basis for a new hearing.

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: (a) an irregularity in the proceedings that prevented the fair consideration of the appeal; (b) an accident or surprise that occurred, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to

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 that occurred during the proceedings. (Cal. Code Regs., tit. 18, § 30604(a)-(e); *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, 728; *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 alleges OTA's written opinion is contrary to law or unsupported by any substantial evidence. As provided in the State Board of Equalization (SBE)'s precedential decision in *Appeal of Wilson Development, Inc., supra*, and as reflected in SBE's Rules for Tax Appeals, SBE 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 continues to apply the same standards as SBE for granting a rehearing; thus, it is appropriate to continue looking to Code of Civil Procedure section 657, applicable caselaw, and precedential decisions for guidance in determining whether to grant a new hearing.

In order to find that OTA's written opinion is against (or contrary to) law, OTA must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-045P; *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 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, 922.)

In summary, deference must be given to determine whether, assuming all facts in the light most favorable to the prevailing party, the written opinion 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, e.g., *In Re Wickersham's Estate* (1902) 138 Cal. 355, 360-361.)

A. Location of title transfer

With respect to the location of title transfer, appellant raises two concerns. First, citing *Northrop Corp. v. SBE* (1980) 110 Cal.App.3d 133 (*Northrop*), appellant contends that it did not have the requisite indicia of ownership to constitute "title" for purposes of Revenue & Taxation Code (R&TC) section 6006 while the aircraft was located in California. Addressing this issue, OTA's written opinion correctly summarized the applicable law as follows:

> [T]he Sales and Use Tax Law provides that a sale or purchase includes any transfer of title *or* possession in lieu of a transfer of title, conditional or otherwise. (R&TC, §§ 6006(a), 6010(a) [emphasis added].) In simplest terms, if there is a transfer of title, there is a sale. (*Ibid*.) Furthermore, if there is a transfer of possession in lieu of title, there is a sale. (*Ibid*.) When both elements are met, the sale occurs upon the earlier of title transfer or transfer of possession in lieu of title . . . . In cases where the seller retains title (whether as security or for any other purpose), then the element of "title" transfer is not met, and a sale will only occur if there has been a transfer of "possession."

In summary, pursuant to R&TC section 6006, a sale includes both: (1) a transfer of title or (2) a transfer of possession in lieu of title. *Northrop* addressed the latter scenario because the sales agreement specified "the legal title to the tooling shall be retained by Northrop [(the seller)] as security for the purchase price." (*Northrop, supra*, 110 Cal.App.3d at p. 143.)

In *Northrop*, SBE determined *Northrop* made a taxable sale based on there being a transfer of possession in lieu of title, which the seller disputed. As such, the court examined the indicia of ownership transferred to the purchaser to determine whether *Northrop* sold the tooling prior to title transfer, on the basis that the purchaser was an equitable owner of the tooling

considering the facts and circumstances. (*Id*. at p. 142-143.) *Northrop* is inapplicable to the instant appeal. Here, appellant's LLC Manager signed a statement under penalty of perjury declaring that appellant "took title to the aircraft while the Aircraft was still . . . in Fresno, California." Furthermore, the parties to the transaction filed an Aircraft Bill of Sale with the Federal Aviation Administration (FAA) transferring "full legal and beneficial title of the aircraft" to appellant in California. In summary, the evidence documenting title transfer in this state is undisputed, and the issue is a legal interpretation of R&TC section 6006. Based on the clear and unequivocal language of R&TC section 6006, which provides that a sale includes a transfer of "title," we have no basis to conclude that our opinion (concluding a sale occurred on the date of title transfer) was contrary to law. In summary, because there was a transfer of legal title, it is immaterial whether appellant's transaction constitutes a "sale" on the basis that there was a transfer of possession in lieu of legal title. The possession analysis is only relevant in absence of a document transferring title.

Appellant also contends that the Bill of Sale was not intended to effectuate a title transfer and, as such, OTA's opinion is unsupported by any substantial evidence. First, we note that "intent" is not an element specifically included in R&TC section 6006. Second, on review, OTA must indulge "in all legitimate and reasonable inferences" to uphold the written opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The available evidence included a document filed with the FAA transferring "full legal and beneficial title of the aircraft" while it was in California. We believe that this document alone would constitute substantial evidence to support our conclusion that title transfer occurred in this state. In addition, the record also included a statement signed under penalty of perjury from appellant's LLC manager that title transfer occurred in this state. As such, we conclude that appellant failed to establish that OTA's opinion (which concluded that title transferred in California) was not supported by any substantial evidence.

B. Application of sales tax

Appellant contends that OTA's finding that "there is no evidence that Fleet held a California seller's permit or that it made any other sales in this state aside from the single sale of the aircraft to appellant, or that it had a place of business in this state," is unsupported by any substantial evidence. Appellant contends that there is evidence that Fleet was required to hold a seller's permit in this state and, as such, the applicable tax was sales tax. As a preliminary

matter, we note that prior to filing this petition for rehearing, appellant's position on appeal had been that the sale was exempt from sales tax. Appellant also argued that even if the sale occurred in California, the sales tax was imposed on Fleet and the transaction was not subject to use tax. Our written opinion concluded the transaction was exempt from sales tax. We understand appellant's petition for rehearing to be reasserting the argument that even if the sale occurred in California, the sales tax was imposed on Fleet and the transaction was not subject to use tax. Nevertheless, to prevail on that argument, appellant would also have to establish that the transaction was *not* exempt from sales tax (contrary to our written opinion's finding on that topic, which neither party disputed in this petition for rehearing).[1]

First, it is undisputed that, for at least some aircraft transactions, Fleet was engaged in business as an Oregon-based aircraft *broker*. A broker is an agent who acts as an intermediary or negotiator between prospective buyers and sellers. (See Black's Law Dict. (8th ed. 1999) p. 205, col. 1.) Thus, by definition, an aircraft or vessel "broker" does not own legal title and, as such, is not considered a "retailer" or required to hold a seller's permit unless the broker voluntarily collects tax from the customer or has the power to, and exercises the power to, transfer title *without* consent or action from the owner of the vessel or aircraft. (Cal. Code Regs., tit. 18, §§ 1569; 1610(c)(2)(C).) Furthermore, a seller's permit is generally required when a person "makes three or more sales for substantial amounts in a period of 12 months." (Cal. Code Regs., tit. 18, § 1595.) Of course, in addition, there must always be sufficient nexus with this state to impose a sales tax liability directly on the retailer. (*Appeal of Praxair, Inc.*, 2019-OTA-301P.) There is no occasional sale exemption for sales of aircraft. (R&TC, § 6367; Cal. Code Regs., tit. 18, § 1595(c).) As such, if the seller is not required to hold a seller's permit, then the purchaser (here, appellant) is required to pay the use tax to the state. (Cal. Code Regs., tit. 18, § 1610(c)(2).)

In the instant appeal, Fleet entered into a special arrangement with appellant and its client, the seller of the aircraft, by also taking title to the aircraft in order to facilitate a sale

[1] Both the sales and use tax are imposed concurrently. (R&TC, §§ 6051, 6201.) Next, there is an exemption from use tax provided the gross receipts are included in the measure of sales tax. (R&TC, § 6401.) Thus, for example, if there is insufficient nexus to impose sales tax on the retailer, and as such the retailer's transactions are exempt from sales tax, the use tax will still apply. (R&TC, §§ 6352, 6401.) As such, to prevail on this argument, appellant would need to establish not only that Fleet is a retailer required to hold a seller's permit, but also that Fleet has sufficient nexus with this state to impose sales tax on Fleet, and that the aircraft sale is not exempt from sales tax, including, for example, for any one of the reasons argued by the parties during the oral hearing.

within certain time requirements. Appellant did not submit any evidence that Fleet made two additional sales of aircraft within the prior 12 months, in which Fleet acted as a retailer, as opposed to a broker. As such, there is no basis to conclude that Fleet was a retailer required to hold a seller's permit in this state at the time it sold the aircraft to appellant. To the contrary, there is evidence to support a finding that Fleet was an aircraft broker and did not otherwise make retail sales. For example, J. Barnett, a third-party broker, submitted a declaration under penalty of perjury stating that he "was asked to deliver the Aircraft to Portland, Oregon by [M. Stevens], who was then known to me as the head of . . . [Fleet.] Fleet was a reputable broker of aircraft, and I have done business with [M. Stevens] in the past." Moreover, appellant had the burden of proof on this matter. We find substantial evidence to support our finding that appellant failed to establish that Fleet was a retailer required to hold a California seller's permit.[2]

Next, citing R&TC section 6203 and California Code of Regulations, title 18, section 1684, appellant makes an alternative argument that these authorities clearly support a finding that Fleet was engaged in business in this state and required to collect the tax. Both provisions interpret constitutional nexus for purposes of the use tax collection obligation imposed on certain out-of-state retailers. Even if we were to accept, *arguendo*, appellant's argument that Fleet was required to register and collect the use tax from appellant, such a finding would have no impact on the outcome of this appeal. The purchaser and the seller are dually liable for a seller's failure to collect use tax from the purchaser, and such liability is not extinguished until the use tax is paid to the state. (R&TC, § 6202(a).) Furthermore, the purchaser is only relieved from liability for the use tax if the purchaser pays the tax to the seller and the seller provided a receipt therefore to the purchaser. (R&TC, § 6202(a), (b).) Here, it is undisputed that appellant did not pay use tax to Fleet or to the state. As such, appellant owes the use tax even if we were to accept this argument as true. Therefore, we find that this argument as a matter of law would not materially affect appellant's rights on appeal and we need not address it further.

[2] Based on our finding that appellant failed to establish Fleet was required to hold a seller's permit, we need not address whether Fleet had constitutional nexus with this state for purposes of imposing sales tax, or whether the transaction was otherwise exempt from sales tax (see footnote 1).

In summary, we find that appellant failed to establish a ground for rehearing and appellant's petition for rehearing is denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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

Date Issued: 8/12/2020